TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, ET AL., APPELLANTS,

vs.

TOWN OF HEMPSTEAD

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED APRIL 7, 1961

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[fol. 1]

IN THE
SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

TOWN OF HEMPSTEAD, Plaintiff-Respondent,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP., Defendants-Appellants.

STATEMENT UNDER RULE 234

The action was commenced in the Nassau County Supreme Court by service of a Summons and Complaint on April 28, 1959. Issue was joined by service of an Answer on May 18, 1959.

Defendants-Appellants appeal from the Judgment entered in this action in the office of the County Clerk of Nassau County on August 4, 1959, which adjudged that Ordinance No. 16 of the Town of Hempstead and enforcement thereof are valid exercises of the Town's police power, which enjoined the defendants from conducting sand mining, dredging and/or pit excavations until a permit is issued therefor and certain alleged violations are corrected, which adjudged that the counter-claim be dismissed and which adjudged that the County Clerk record a certified copy of said Judgment in the Miscellaneous Index in his office.

There have been no changes of attorneys since the commencement of this action. Plaintiff appeared by John A. Morhous, Esq., by Richard P. Charles, Esq., Special Coun-
[fol. 2] sel, Town Attorney, Town Hall, Front Street, Hempstead, N. Y. Defendants appeared by Edward M. Miller, Esq., 127 Twig Lane, Levittown, N. Y. There have been no changes in parties since the commencement of this action.

[fol. 3]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

TOWN OF HEMPSTEAD, Plaintiff,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP., Defendants.

NOTICE OF APPEAL TO THE APPELLATE DIVISION—
August 4, 1959

Sir:

Please take notice, that the defendants hereby Appeal to the Appellate Division, Second Department, of the Supreme Court of the State of New York, from the Judgment entered in this action in the office of the Clerk of the County of Nassau on the 4th day of August, 1959, which said Judgment adjudged that the Ordinance No. 16 of the plaintiff and enforcement thereof are valid exercises of the Town's police power, that the defendants be enjoined from conducting sand mining, dredging or pit excavations, that the defendants' counterclaim be dismissed on the merits, and that this Appeal is taken from each and every part of said Judgment as well as from the whole thereof.

[fol. 4] Yours, etc.,

Edward M. Miller, Attorney for Defendants, Office and P. O. Add.: 127 Twig Lane, Levittown, New York.

To: John A. Morhous, Esq., Town Attorney and Attorney for Plaintiff, Office and P. O. Address, Town Hall, Front Street, Hempstead, N. Y.

Clerk, County of Nassau.

[fol. 5]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

SUMMONS

Plaintiff designates Nassau County as the place of trial.

To the above named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default, for the relief demanded in the complaint.

Dated, April 23, 1959.

John A. Morhous

[fol. 6]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

COMPLAINT

Plaintiff, by its attorney, John A. Morhous, complaining of the defendants alleges:

As and for a First Cause of Action

First: At all times hereinafter mentioned, plaintiff was and still is a municipal corporation of the State of New York, having its offices at Town Hall, Front Street, Hempstead, in the County of Nassau, State of New York.

Second: On information and belief, and according to public records, defendant Herbert W. Goldblatt, at all times hereinafter mentioned, was and still is the owner of the premises hereinafter described in the paragraph of this complaint marked Fourth.

Third: On information and belief, at all times hereinafter mentioned, defendant Builders Sand & Gravel Corp. was and still is a domestic corporation organized and existing under the laws of the State of New York.

Fourth: Defendant, Builders Sand & Gravel Corp., is conducting sand mining, dredging and/or pit excavation operations on premises owned by defendant, Herbert W. [fol. 7] Goldblatt, the same premises being located on the east side of Newbridge Avenue at East Meadow, an unincorporated area in the Town of Hempstead, County of Nassau, State of New York, shown on the Land & Tax Map of the County of Nassau as Section 50, Block L, Lot 9, comprising approximately 39 acres.

Fifth: The said property has been utilized for sand mining, dredging and/or excavation by Builders Sand & Gravel Corp. and/or other persons since prior to December of 1945.

Sixth: Pursuant to Sections 130 and 136 of the Town Law of the State of New York, the Town of Hempstead duly adopted, on or about December 18, 1945, an Ordinance regulating sand mining, dredging and/or excavation known as "Ordinance No. 16 of the Town of Hempstead". A copy of said Ordinance, as amended, is annexed hereto and made a part hereof.

Seventh: The defendants have failed to procure or to apply for a permit, in violation of the provisions of "Ordinance No. 16 of the Town of Hempstead".

Eighth: The failure and refusal of the defendants to comply with the requirements of "Ordinance No. 16 of the Town of Hempstead" by applying for and obtaining a permit is a continuing violation of said Ordinance by the defendants.

Ninth: The plaintiff has no adequate remedy at law and has not heretofore applied for the relief herein sought.

[fol. 8] As and for a Second Cause of Action

Tenth: The plaintiff reiterates and realleges each and every allegation contained in paragraphs numbered First through Sixth of this complaint.

Eleventh: On information and belief, at the present time and for a period of time prior hereto, the defendants have used or permitted to be used the described property in violation of the express provisions of "Ordinance No. 16 of the Town of Hempstead", as amended, in that: At various locations the pit excavation commences within 20 feet from the adjoining property line; and in that, in certain places the pit excavation is more than 10 feet below the established grade of the nearest public street and the incline of the sidewalls is more than 2 horizontal feet to 1 vertical foot and said sidewalls are not supported by retaining walls; and in that, there is no concrete curb beneath the fence which encloses the described property, and said fence contains openings, other than necessary gates for ingress and egress, which permit public access to the pits and slopes; and in that, the pit has been excavated substantially beyond points 2 feet above the maximum ground water levels at the site; and in that, defendants have failed to refill the pit excavation or parts thereof in those places where earth has already been removed to the maximum extent allowed under the Ordinance.

Twelfth: The violations described in paragraph Tenth are continuing violations of "Ordinance No. 16 of the Town of Hempstead" by the defendants.

[fol. 9] Thirteenth: The plaintiff has no adequate remedy at law and has not heretofore applied for the relief herein sought.

Wherefore, plaintiff demands

1. Judgment enjoining and restraining defendants from conducting said sand mining, dredging and/or pit excavation operations perpetually, or until such time as they shall correct the present violations and obtain from the Town of Hempstead the permit required under "Ordinance No. 16

of the Town of Hempstead", and for such other and further relief as to the Court may seem just and equitable in the premises.

2. That an order be made, pending the determination of this action, enjoining and restraining the defendants from conducting sand mining, dredging and/or pit excavation operations on the premises located on the East side of Newbridge Avenue at East Meadow, Town of Hempstead, County of Nassau, State of New York.

John A. Morhous

[fol. 10]

ORDINANCE ANNEXED TO COMPLAINT

(See Opposite ☞)

TOWN OF HEMPSTEAD, NEW YORK

ORDINANCE No. 16

Pursuant to the provisions of Section 130 of the Town Law of the State of New York, as amended, the Town Board of the Town of Hempstead, Nassau County, New York, does hereby ordain and enact the following ordinance relating to

BANK AND PIT, TOPSOIL REMOVAL AND OTHER EXCAVATIONS

I, NATHAN L. H. BENNETT, Town Clerk of the Town of Hempstead, do hereby certify that the following is a true transcript of the above mentioned ordinance and of the whole of such original as adopted by the Town Board of the Town of Hempstead on December 18, 1945, and last amended Nov. 25, 1958.

ARTICLE I

Section 1. Declaration of Policy. It is hereby declared to be the policy of the Town Board to provide for the proper use of land to prevent all manner of excavations which create pits, holes, or hollows in the earth, leaving it in a hazardous or dangerous state, or cause soil erosion which depletes the land of its natural vegetative cover and supply of organic material, renders such land unproductive and unsuitable for agricultural purposes and undesirable for building homes, resulting in lower land values. By this ordinance the Town Board seeks to remove the danger to health and life caused by deep excavations remaining in the ground; and the stripping of topsoil, thereby resulting in damage to agricultural crops through dust storms in dry weather, by exposure of the bare earth to wind action and in wet periods by pools of water, which ordinance will promote the safety, health and general welfare of the people of the Town.

Section 2. As used in this ordinance the following terms shall have the meanings hereinafter designated:

(a). Earth — shall include sand, clay, gravel, mud, log and rock, but not topsoil.

(b). Excavation. — shall mean the removal of more than 75 cubic feet of earth from the ground in a vertical dimension of more than three feet for any purpose other than the improvements of land for permitted uses not otherwise regulated by this ordinance, other than sewage disposal systems, other than the purposes described by Sec. 9 hereof, and other than the removal of material subject to the Dredging Ordinance of the Town of Hempstead.

(c). Pit Excavation — shall mean any excavation involving the removal of more than one thousand cubic feet of earth leaving a hole or depression below the grade of the surrounding land;

(d). Bank Excavation — shall mean any excavation involving the removal of more than one thousand cubic feet of earth, other than a pit excavation.

Section 3. Application for Permit. Before any excavation is commenced for any purpose and topsoil, earth, sand, gravel, rock or other substance is removed from the ground, the owner, lessee or agent of the premises shall obtain a written permit therefore from the Town Board. For that purpose, such applicant shall file with the Building Inspector of the Town of Hempstead a verified application in duplicate for such permit, containing a detailed statement of the proposed work, together with a plan prepared by a duly licensed engineer or land surveyor of the State of New York, setting forth in detail the following information:

(a). All information as required on the application form prepared by the Building Department, including a detailed statement of the proposed work and three dimensional extent of the proposed excavation and exact condition of the plot or premises before the work is commenced and proposed condition of the said plot or premises after the work is completed;

(b). The plan shall be drawn to scale and give all streets adjoining the property, the location and dimensions of the premises upon which it is proposed to excavate, location, size and use of any existing buildings, cross sections of the property, giving elevations thereof at intervals of fifty (50) feet squares and also at each break in the grades, and the elevation of the premises as compared to the elevation of any abutting highways;

(c). A duly acknowledged consent in writing of the owner of the premises and mortgagee, if any, including his or their address;

(d). Receipted tax bills or a certificate from the Receiver of Taxes of the Town of Hempstead and the County Treasurer of Nassau County showing payment of all taxes or assessments to date against the property described in the application.

(e). A certificate of the Commissioner of Public Works of the County of Nassau that such proposed excavation and the finished grades of said property as shown on said map will not interfere with the Comprehensive Drainage Plan of the County of Nassau and will not endanger any road, street or highway of the County of Nassau or of the Town of Hempstead or other property of the said County or Town.

(f). A certificate from the Commissioner of Agriculture and Markets of the State of New York, or his duly appointed agent or representative, stating any topsoil to be taken in the area described in the application is apparently free of Golden Nematode of Potato.

(g). The purpose of the proposed excavation;

(h). The existing and the theoretical maximum ground water level at the location.

Section 4. (a) No Pit Excavation shall be made within twenty (20) feet of any property line.

(b). No pit or bank excavation shall be made greater than ten (10) feet below the established grade of the nearest public street or highway unless the side walls remain at an incline of at least two horizontal feet to one vertical foot or are supported by retaining walls equal to that specified in the Building Code of the Town of Hempstead for permanent building foundations.

(c). Any removal of more than 75 cubic feet of earth from the ground in a vertical dimension of more than three feet shall be protected by suitable barriers and lights. All pit and bank excavations shall be completely surrounded by wire fencing of the type known as chain link or cyclone fence, or its equivalent, of the height of six (6) feet set on a concrete curb not less than 18 inches in depth, with no opening except necessary gates for ingress and egress, to prevent public access to the top of any pits or deeply graded slopes.

(d). Dust-down or a similar dust layer shall be spread on access roads and other traveled areas used in connection with every pit or bank excavation to protect the public and the surrounding area against wind-blown mold and dust.

(e). No removal of earth from the ground shall be so made as to undermine, weaken or deprive of support other lands in the vicinity or to substantially obstruct, impede or change the course of or the natural movement or flow of the water in or otherwise adversely affect any public waterway or public body of water or

[fol. 12]

Ordinance Annexed to Complaint

(See Opposite ☞)

any watercourse, body of water which is used as a part of any public drainage system.

(f). No removal of earth from the ground shall be made so as to expose to possible pollution, by salt water intrusion or otherwise, any underground water used as a public water supply.

(g). No removal of earth from the ground shall be so made as to prevent or interfere with the orderly development, for residential, business, manufacturing or public purposes, of other lands in the vicinity, or so to render unreasonably difficult or unreasonably delay travel from one place to another or so to render unduly difficult or substantially increase the cost of the installation of public utilities or other public services, or so to substantially depreciate the value of real property in the vicinity.

(h). No excavation shall be made below two feet above the maximum ground water level at the site.

(i). The Town Board may deny any application for a permit hereunder if it shall find that the proposed excavation will violate any of the provisions of this section, and, may revoke or suspend any permit issued hereunder if it shall find that the removal of earth thereunder violates any such provision.

(j). When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance or the removal of earth from any such part has been discontinued or abandoned or the permit for such removal has expired, such pit or part thereof shall be immediately refilled with clean, non-burnable fill containing no garbage, refuse, offal or any other deleterious or unwholesome matter and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

TOPSOIL STRIPPING AND REMOVAL

Section 5. No Stripping or Removal. No stripping or removal of topsoil shall be made within ten (10) feet of any property line and upon completion of the work the premises, if below grade, shall be graded to the level of the abutting highway or the original grade if the same were below the level of the highway. Dust-down, or its equal, shall be spread to prevent dust from flying and there shall be left upon the surface of the land from which topsoil is removed not less than six (6) inches of topsoil. No topsoil shall be removed between the first day of October and the first day of April in the following year. All areas from which topsoil is removed shall during the period between August 30th and October 1st, inclusive, be prepared into a loose level seed bed, fined, fertilized and seeded in the following steps:

(a) Apply Ground Limestone at the rate of one ton per acre.

(b) Apply 5-10-5 fertilizer at the rate of 600 pounds per acre.

(c) Disc area to work limestone and fertilizer into the soil to a depth of at least three inches.

(d) Smooth area with a smoothing harrow.

(e) Sow the following seed mixture at the rate of 100 pounds per acre:

Timothy	30 pounds
Kentucky Bluegrass	30 pounds
Redtop	10 pounds
Perennial Rye Grass	20 pounds
Alsike Clover	4 pounds
Wild White Clover	1 pound
	100

(f) Brush in seed lightly.

(g) Roll firm with ground roller.

PROVISIONS APPLICABLE TO BOTH BANK AND PIT EXCAVATIONS AND TOPSOIL REMOVAL

Section 6. Bond or Cash Deposit. Before the issuance of a permit, the applicant and the owner of record of the premises shall execute and file with the Town Clerk, a bond, approved by the Town Board of the Town of Hempstead in an amount to be fixed by said Board, but not less than $2,000 with a surety company as surety and conditioned for the faithful performance of the conditions contained in this Article, the observance of all municipal ordinances, and to indemnify the Town of Hempstead and/or the Superintendent of Highways for any damage to Town property. In the event of a default such bond shall be forfeited to the Town of Hempstead.

Said bond shall remain in full force and effect until a certificate of completion has been issued by the Building Inspector, certifying to the fact that all provisions of this ordinance and conditions of the permit have been fully complied with. Application for such certificate shall be made by the applicant, owner, lessee or his agent on forms provided by the Town of Hempstead and shall be accompanied by a map drawn to scale showing a cross-section of the affected property, giving elevations thereof as provided in subdivision (b) of Section 3 of this ordinance, prepared by a duly licensed engineer or land surveyor of the State of New York after the completion of the operations, who shall also certify that there is not less than six (6) inches of topsoil remaining upon the ground from which topsoil has been removed and that such area has been seeded in compliance with Section 5 hereof.

In lieu of such bond a cash deposit or deposit of negotiable securities may be made with the Presiding Supervisor of the Town.

Section 7. Fees. The officer designated by the Town Board to issue such permits shall charge and collect for each such permit:

(a) Bank and Pit Excavations. A minimum fee of $200 for an excavation volume not to exceed 20,000 cu. yds. For excavations exceeding 20,000 cu. yds. the minimum fee shall be $200, plus one cent for each additional cu. yd. or fraction thereof.

(b) Topsoil Removal. A minimum fee of $25 for an area not exceeding 5,000 sq. ft. For areas exceeding 5,000 sq. ft. the minimum fee shall be $25, plus $10.00 for each additional 5,000 sq. ft. or fraction thereof.

Section 8. Limitation of Permits.

(a) Bank and Pit Excavations. Such permits shall expire by limitation one year from the date of issuance, unless extended by the Town Board.

(b) Top Soil Removal. Such permits shall expire by limitation sixty (60) days from the date of issuance unless extended by the Town Board, and no permit or permits shall be granted:

(1) For removal of more than four (4) acres of topsoil from any one tract of land until full compliance with the ordinance is had under any existing permit for the same tract except the preparation of the ground and seeding as provided in Section 5 hereof, and

(2) No permit shall be valid except between April 1st and October 1st of any year.

Section 9. Exceptions. Nothing contained in this ordinance shall require a person to obtain a permit hereunder for or prevent a person from removing topsoil from one part of his lands to another part of the same premises when such removal is necessary or an accessory use or is made for the purpose of leveling or improving said property or for the installation of public improvements or public utilities, or to obtain a permit hereunder either for the installation of public utilities under a road opening permit or for the removal of material regulated by the Dredging Ordinance of the Town of Hempstead, No. 62.

Section 10. Penalties. For any and every violation of the provisions of this Ordinance, the owner, general agent, or contractor of a building or premises where such violation has been committed or shall exist, and the lessee or tenant of the premises where such violation has been committed or shall exist and the owner, general agent, contractor, lessee or tenant of any part of the premises in which such violation has been committed or shall exist, and the general agent, architect, engineer, surveyor, building contractor or any other person who knows, permits, takes part or assists in any such violation, or who maintains any premises in which any such violation shall exist, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than $250.00 or imprisonment for a period not exceeding 6 months for each such offense, or by both such fine and imprisonment. Each week's continued violation shall constitute a separate additional violation.

Section 11. Separability. If any clause, sentence, paragraph, section or part of this Code shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part thereof directly involved in the controversy in which such judgment shall have been rendered.

Section 12. This Ordinance shall be known and may be cited as "Top Soil Removal Ordinance of the Town of Hempstead" or as Ordinance No. 16 of the Town of Hempstead.

Article 17 of the Building Code of the Town of Hempstead, adopted on May 20th, 1941 and amended on March 9th, 1943 is hereby repealed.

This ordinance shall take effect immediately.

[fol. 14]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

ANSWER

Defendants, answering the complaint herein by their attorney, Edward M. Miller, respectfully allege:

First: As to the first cause of action, deny each and every allegation contained in paragraphs designated "Sixth" through "Ninth" of the complaint herein.

Second: As to the second cause of action, repeat and reallege the aforesaid denials to the extent that the same matter is repleaded by reference, and deny each and every allegation contained in paragraphs designated "Eleventh", "Twelfth" and "Thirteenth" of the complaint herein.

As and for a First, Separate and Complete Defense:

Third: That heretofore and on or about April 5th, 1956 a Judgment was entered in the Office of the Clerk of the County of Nassau, adjudging that the defendants herein have a valid, nonconforming use in the conduct of a sand and gravel business notwithstanding any ordinances of the plaintiff as to the real property set forth in the complaint herein, and defendants beg leave to refer to the original [fol. 15] thereof upon the trial for the exact provisions thereof.

Fourth: That by reason of the aforesaid Judgment, the alleged issue of the complaint herein is res adjudicata and that the said Judgment is a bar to the maintenance and prosecution of this action.

As and for a Second, Separate and Complete Defense and Counterclaim:

Fifth: Repeat, reiterate and reallege each and every allegation contained in paragraphs Third and Fourth herein, with the same force and effect as if herein set forth at greater length.

Sixth: That the Ordinance alleged in the complaint herein is unconstitutional, illegal, invalid, discriminatory, confiscatory and void, inasmuch as same is deemed to affect the premises of the defendant, Goldblatt, in that this Court has previously adjudicated the non-conforming use of the premises for the business conducted by the defendants herein; that the said Ordinance further is void on the ground that it constitutes *ex post facto* legislation and contravenes the provisions of the U. S. Constitution and the Constitution of the State of New York; that said Ordinance further is void on the ground that its application would deprive the defendant, Goldblatt, of the lawful use of his property without due process of law and further that application thereof to the said premises so permanently restricts the beneficial use thereof as to amount to a confiscation of property rights without just compensation.

[fol. 16] Seventh: That by reason of the aforesaid, defendants are entitled to a Judgment decreeing the said Ordinance as unconstitutional and void as applied to the real property described in the complaint, for which defendants have no adequate remedy at law.

As ard for a Third, Separate Defense:

Eighth: That the plaintiff, over a period of many years, has indicated a need for and the desire to acquire the real property set forth in the complaint, in order to correct drainage conditions in the adjacent area.

Ninth: That the plaintiff, for some period of time, has installed drainage pipes in streets adjacent to the premises involved herein; that in the specifications for public bidding on such improvements the plaintiff's engineering department has indicated a flow of water toward the property of the defendant and the installation of pipe to the property line of the defendant.

Tenth: That the plaintiff, over a period of many years, has been engaged in a series of trials with the defendants concerning this property, not for the enforcement of public rights but calculated solely to harass and annoy these de-

fendants in an attempt to acquire the realty alleged in the complaint at a price lower than true value.

Eleventh: That as a result of the aforesaid, the plaintiff appears in Equity with unclean hands and is not entitled to relief from this Court.

[fol. 17] Wherefore, defendants demand Judgment:

(1) Dismissing the complaint herein;

(2) Declaring the Ordinance pleaded in the complaint as being unconstitutional, void and ineffective as applied to the defendants and to the real property described in the complaint;

(3) For such other and further relief as to the Court may seem just and proper;

together with the costs and disbursements of this action.

Edward M. Miller

[fol. 18]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

Special Term, Part II, Mineola, N. Y.

Present: Hon. Mario Pittoni, Justice.

JUDGMENT APPEALED FROM—Entered August 4, 1959

An action having been commenced by the service of a copy of the summons and complaint on each of the above named defendants, and the defendants having interposed an answer asserting a counter claim, and it having been stipulated upon the trial of the action in open court and on the record that plaintiff be deemed to have replied to and to have denied the defendants' alleged counter claim, and the action having regularly come on for trial at Special Term, Part II of the Supreme Court, Nassau County, held in the Court House at 33 Willis Avenue, Mineola, New York, on the 16th, 17th and 18th days of June, 1959, and the plaintiff having appeared on said trial by John A. Morhous,

Esq., Town Attorney, Town of Hempstead, and Richard P. Charles, Esq., as Counsel, and the defendants having appeared upon the said trial by Edward M. Miller, Esq., their attorney, and the plaintiff and defendants having adduced their proofs, and at the close of the entire case, and after due deliberation the Court having made and filed a signed and written opinion and decision dated July 13, 1959 grant-
[fol. 19] ing judgment on the merits in favor of the plaintiff, Town of Hempstead, and against the defendants, Herbert W. Goldblatt and Builders Sand & Gravel Corp., for the relief demanded in the complaint to the extent hereinafter set forth, and further dismissing the defendants' said alleged counter claim,

Now, on motion of John A. Morhous, Esq., Town Attorney, Town of Hempstead, attorney for the plaintiff, it is hereby

Ordered, adjudged and decreed that Ordinance No. 16 of the Town of Hempstead and the enforcement thereof are valid exercises of the Town's police power, and it is further

Ordered, adjudged and decreed that the defendants, Herbert W. Goldblatt and Builders Sand and Gravel Corp., their servants, agents, employees, representatives, heirs, assigns and successors in interest are enjoined from conducting sand mining, dredging and/or pit excavations on the real property known as Section 50, Block L, Lot 9 on the Land Map of the County of Nassau, until such time as (1) a permit for such operations has been issued by the Town of Hempstead pursuant to said Ordinance No. 16, and (2) the defendants shall have corrected the following violations of the said Ordinance No. 16:

(a) the excavation commences within 20 feet from the adjoining property line;

(b) The excavation is more than 10 feet below the established grade of the nearest public street and the incline of the side walls is more than 2 horizontal feet to 1 vertical foot and the said side walls are not supported by retaining walls;

[fol. 20] (c) There is no concrete curb beneath the fence which encloses the property and said fence contains openings other than necessary gates for ingress and egress, which permit public access to the pits and slopes;

(d) The pit has been excavated substantially beyond points 2 feet above the maximum ground water levels at the site;

(e) The defendants have failed to refill the pit excavation or parts thereof in those places where earth has already been removed to the maximum extent allowed under the Ordinance;

and it is further

Ordered, adjudged and decreed that the counter claim of the defendants herein be, and the same hereby is, dismissed on the merits; and it is further

Ordered, adjudged and decreed that the Clerk of the County of Nassau be and he hereby is directed to record a certified copy of this Judgment in the Miscellaneous Index or other appropriate index of the records in his office against the premises above described.

Enter:

Mario Pittoni, J. S. C.

Francis J. Anderson, Deputy & Acting County Clerk of Nassau County.

[fol. 21]

IN THE SUPREME COURT OF NEW YORK

COUNTY OF NASSAU

Special Term—Part II

Case and Exceptions—Transcript of Hearing—June 16, 1959

Mineola, New York

Before: Hon. Mario Pittoni, Justice.

APPEARANCES:

John A. Morhous, Esq., Town Attorney, By Richard P. Charles, Esq., Special Counsel, William C. Mattison, Esq., Mario Matthew Cuomo, Esq.

Edward M. Miller, Esq., Attorney for the Defendants.

The Court: Before we get started, will you tell me briefly what this case is about?

Mr. Charles: Yes, sir.

PLAINTIFF'S OPENING STATEMENT

The Court: Just to give me an idea of what the case is about so that I may follow it more closely.

Mr. Charles: Yes, sir. The plaintiff, as your Honor knows, is the Town of Hempstead. The defendant Herbert Goldblatt is the owner of a certain parcel of land known on the tax map of the County of Nassau as Section 50, Block L, Lot 9. It is about a 39-acre plot of land and it lies over in East Meadow, North Bellmore.

[fol. 22] It is the plaintiff's contention that, in violation of Ordinance No. 16 of the Town Ordinances of the Town of Hempstead, the defendants are mining sand and carrying on a mining operation of sand and gravel on this 39-acre plot; that they are doing it without having applied, as we allege in the first cause of action, for a permit in accordance with the terms of the ordinance; and that no permit has ever been issued to it for the mining of sand on this plot. That is our first cause of action.

Our second cause of action alleges that in violation of the ordinance, and on the regulatory part of the ordinance, the operation being conducted by the defendants violates the ordinance in the following manner: that the pit commences within 20 feet of an adjoining property line; that it is 10 feet below the established grade of the nearest public street; and that the side walls of the pit, namely the slope of the pit, are more than 2 horizontal feet to a 1 vertical foot drop in depth; furthermore, that there is no concrete curb around the fence of the pit. There is a provision in the ordinance that the pit be fenced, but there is also another provision that at the bottom of the fence there be a concrete curb beneath the fence.

We further allege that the bottom of the pit now has been excavated substantially beyond 2 feet above the maximum ground water levels at the site. That is a method of determining where the natural waters run out of the ground and form a pond or a pit. Under that point we will prove that of the 39 acres that are involved in this parcel, approximately 20 acres are land under water with an average depth [fol. 23] of approximately 25 feet, and in some places a depth of 48 feet. This is water all below the maximum ground water level.

We say that under those circumstances we have no adequate remedy at law, and pursuant to Section 135 of the Town Law, in prosecutions under ordinances of this type, we have the right to ask this court for an injunction restraining the defendants from mining operations, (1) until they file an application and obtain a permit, and (2) until they comply with the regulatory statute sections of the ordinance. That is the plaintiff's case.

The Court: Mr. Miller.

Defendants' Opening Statement

Mr. Miller: If it please the Court, the defense in this action will be based on both legal defenses and equitable defenses; of course, this is a trial in equity. The legal defenses to the complaint of the plaintiff basically arise from a determination which we secured back in a trial before Mr. Justice Hill in this court, which action was commenced in

1953. We have been in constant litigation with the township since 1953.

The first case was an action to perpetually enjoin our mining operations on the ground that we violated the zoning ordinance and were conducting business in a Residence "B" zone. Mr. Justice Hill, after taking testimony as to the extent and nature of our operation, the size of the lake, the depth of the lake, the extent of our equipment—and I have the minutes of that trial and will introduce it in evidence—entered a decision in the defendants' favor dismissing the complaint and granting our counterclaim, in which he held that we had a valid nonconforming use under the decisions [fol. 24] of the Court of Appeals, namely People v. Miller and Town of Somers v. Camarco, and that our mining operation could be carried on in futuro as to the entire 38-acre parcel.

Our first legal defense, therefore, if your Honor please, is that with respect to the operation of this mining business the alleged issues in the complaint herein are res judicata, and that this is an attempt to again litigate what has already been litigated before Mr. Justice Hill and from which no appeal was taken. I therefore will submit to the Court as a matter of law that this is the law of this case, because there is an identity of parties, an identity of subject matter, and that the Town should be forever barred and foreclosed from again raising the same questions. Their remedy was to take an appeal which they did not do; therefore, it is determinative as to those points here.

We will show your Honor also that since 1953 and for some time prior thereto a severe drainage condition has existed in the neighborhood; that the Town has made repeated efforts, and the County has made repeated efforts, to obtain easements, to negotiate for the purchase and to discuss condemnation. We will show you maps officially drawn for condemnation of our property. We will adduce also testimony as to the various conferences with the Town and County officials upon which we expect to convince the Court that the motive behind this suit is to try and knock down the price in a condemnation proceeding which we feel is imminent, and we believe your Honor will agree with us.

The plaintiff therefore, we say, does not appear in equity today in good faith and with clean hands, and therefore [fol. 25] should be barred from the relief that it seeks.

Further, we will ask the Court, after the production of proper evidence, not only to dismiss the complaint, but also to grant us an affirmative judgment in our favor, in that any of the alleged violations of this Ordinance No. 16 are not violations but that we have a valid existing and subsisting nonconforming use with respect to those provisions.

Mr. Charles outlined two or three points which he says the plaintiff expects to prove, such as that we are too close to the fence. We will prove to your Honor's satisfaction that we were in such a position long before they had any such ordinance, and therefore we have the basic law of nonconforming use again coming into play in this case, the same as on the zoning question before Mr. Justice Hill.

In 1927—and these are in the minutes of the first trial—we had a lake 30 feet in depth, so that quite obviously we were 10 feet below grade in 1927 and we were to a greater extent below the 2 feet above maximum ground level in 1927, and this township never had any ordinance of any kind until the zoning ordinance of 1930. As a matter of law we respectfully submit that we will prove that we have a valid nonconforming use as against the alleged violations of the second cause of action in the complaint.

With respect to the cause of action in the complaint on a permit, our defense is that this is a penal ordinance. The punishment for the violation of this ordinance is a misdemeanor. To make this ordinance therefore operate retrospectively is ex post facto legislation and therefore uncon- [fol. 26] stitutional. This is not a civil ordinance, this is a criminal ordinance, and the ordinance in its own terms reads, "Application for permit before any excavation is"—

The Court: How can it be ex post facto if they claimed present violation?

Mr. Miller: For the simple reason, Judge, it says, "Before any excavation is commenced." In other words, if I wanted to start a brand-new sand pit today on virgin vacant land, I would be governed by the terms of this ordinance. But for them to bring it in this case and say, "This applies back to you even though you started in 1927," back before

we ever had an ordinance, that is applying it retrospectively, not prospectively, and therefore it would be ex post facto to go back to 1927 and say, "What you did in 1927, although then legal, we now declare illegal."

The Court: But, counsel, before we get involved in that ex post facto situation, the ex post facto laws only apply to criminal prosecutions.

Mr. Miller: If your Honor please, they are bringing injunctive relief under a criminal statute, because this section has penalties. Section 10 provides that violation of this—a person shall be guilty of a misdemeanor punishable by a fine of not more than $500 or imprisonment for a period not exceeding six months, and each week's continued violation is a separate violation. This is a penal statute, this is not a civil statute, this is not a regulatory provision; this is a criminal statute punishable by jail and fine.

The Court: But they are not asking jail and fine.

[fol. 27] Mr. Miller: They are not asking it in this proceeding, but that I say is the actual punishment under the very terms of the ordinance under which they base their complaint, and on those defenses which we expect to prove to the Court's satisfaction, we submit that there should be a dismissal herein and an affirmative judgment on our counterclaims in favor of the defendants.

The Court: All right. I have your respective positions now, and I also gave you some thoughts that I had on the question of ex post facto.

Mr. Miller: Yes. If your Honor please, as I stated to your Honor on the call of the calendar yesterday morning, in preparing for this trial in two weeks with the extensive examinations, I have been unable to complete my memorandum of law and would have to ask the Court's indulgence for a time after the completion of the trial, and I will be glad to brief the question of ex post facto also when I get to that.

The Court: You can brief it. I hope it has not changed since I last looked at it.

Mr. Charles: Mr. Ahrens.

GEORGE C. AHRENS, residing at 22 Daffodil Lane, Wantagh, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

COLLOQUY

Mr. Charles: Before I examine the witness, your Honor, there is just one thing that bothered me on a question of pleadings. The second separate defense is labeled a second separate and complete defense and counterclaim. As a matter of fact, it is not a counterclaim, and I did not reply [fol. 28] to it, deeming the second separate defense deemed denied. If for the purpose of the record we want the counterclaim denied, I ask the Court to permit me to show on the record that the counterclaim is considered denied.

Mr. Miller: I have no objection, if your Honor please, to the counterclaim being deemed denied. It was denominated a counterclaim because we asked for affirmative relief in a way of a declaratory judgment from the court after the production of all evidence.

The Court: Then the counterclaim is deemed denied upon your motion and upon the consent of Mr. Miller.

Mr. Charles: Thank you.

Mr. Miller: Mr. Charles before we proceed, if your Honor please, I would like at this time to offer a notice to admit dated June 1, 1959.

(Discussion between counsel off the record.)

Mr. Miller: We have made eleven separate examinations before trial in this case, Judge. I have only received back ten of them signed, but I understand one of them will be back either late today or tomorrow, and I would like to offer them at the beginning of the trial, the separate examinations.

Mr. Charles: Just a moment on that. You examined these witnesses on behalf of your defenses, and we stipulated at the beginning of the examinations that the relevancy of [fol. 29] the examinations was to be reserved until the trial, and I think as a matter of procedure we should wait until I have proven my case, and then you can specifically tell me which one of these you are offering on which defense

so I will know where we are going, instead of just taking eleven examinations totaling 200 pages and dropping them on the Court's lap and our lap without any question of their relevancy, materiality or competency.

The Court: Suppose you let Mr. Charles try his plaintiff's case first, and then after he finishes proving the case as he wishes, you will have your opportunity, of course, to defend this case as you wish within the rules of evidence, of course.

Mr. Miller: I will withdraw that, Judge, because all of the persons who have been examined are under subpoena and they will be here as witnesses.

The Court: We will talk about that when we get to your defense, Mr. Miller.

Direct examination.

By Mr. Charles:

Q. Mr. Ahrens, where are you employed?

A. I am employed in the Town Hall of the Town of Hempstead.

Q. In what capacity?

A. I am a deputy town clerk.

Q. As a deputy town clerk of the Town of Hempstead, are the records of the Town under your care and supervision?

A. They are.

Q. Did you make an examination of those records for the purposes of seeing whether or not any application had [fol. 30] even (sic) been filed against the property known as Section 50, Block L, Lot 9, on the Land and Tax Map of the County of Nassau for permission to mine sand and gravel?

A. I did.

Q. Did you find any such application?

A. I did not.

Q. Did you then search the records for the purposes of ascertaining whether or not any permit at any time had even (sic) been issued to this land known as Section 50, Block L, Lot 9, for granting permission to mine sand and gravel on the premises?

A. I did make such a search, yes.
Q. Did you find anything?
A. No, I did not.

Mr. Charles: Your witness.

By Mr. Miller:

Q. Mr. Ahrens, do you have any knowledge of an action—

Mr. Charles: Just one other point, before you go ahead.

By Mr. Charles:

Q. At my request did you produce a copy of Ordinance No. 16?
A. Yes, I have.
Q. May I see it?
A. Yes. (Produced.)
Q. That is your signature certifying to the correctness of it?
A. Yes, it is.

Offer in Evidence

Mr. Charles: I offer it in evidence.
The Court: What is that, Mr. Charles?
Mr. Charles: That is the ordinance, Ordinance No. 16.
[fol. 31] Mr. Miller: No objection.

(Received in evidence and marked Plaintiff's Exhibit 1.)

Cross examination.

By Mr. Miller:

Q. Mr. Ahrens, do you have any knowledge of previous litigation between the Town of Hempstead and the owners of this sand pit?
A. No direct knowledge, no.
Q. When you say "direct," that implies indirect. Do you have any knowledge of any nature with respect to any previous litigation between the Town and the owners of this pit?
A. I heard you discussing it with Mr. Charles before.

Q. I show you from the County Clerk's file in Proceeding No. 7006 of 1954 a judgment signed by Hon. L. Barron Hill and ask you if you would look at this, please, and then I ask you if you have any personal knowledge of that lawsuit.

A. I do not recall it, no.

Q. I ask you, sir, in the same County Clerk's file if you will read a decision by Mr. Justice Hill dated March 9, 1956, and ask you if you have any knowledge of that decision.

The Court: Keep in mind, Mr. Miller, this man has merely testified about a search for two documents, that is all he has testified to. He has merely produced a copy of an ordinance, and that is all he has testified to, that is all he was called here to testify to.

Mr. Miller: I realize that, sir.

The Court: Before we go any further, there is an old saying in baseball, "Keep your eye on the ball." Do not [fol. 32] confuse me with side issues.

Mr. Miller: I am not trying to confuse you, sir.

The Court: What are you going to develop through this witness?

Mr. Miller: It is cross-examination, Judge, on the question of credibility.

The Court: I know it is cross-examination.

Mr. Miller: On the question of credibility. I want to know if he has any knowledge of this proceeding.

The Court: What credibility?

Mr. Miller: He testified there was no permit to mine sand and gravel. There is an implication in his testimony that it is an illegal operation. I want to show that it is legal by an order of this court, by a judgment of this court.

The Court: Go ahead.

A. I have no knowledge of this, sir, no recollection of it, anyway.

Mr. Miller: I have no further questions.

The Court: Thank you, Mr. Miller.

(The witness was excused.)

Mr. Charles: Now, if your Honor pleases, Mr. Miller and I, for the sake of cutting down on a lot of technical proof, have agreed that this aerial photograph which I am about to introduce in evidence is an accurate photo-[fol. 33] graph of the sand pit which is the subject matter of this litigation as it existed on March 25, 1959, and I ask that it be marked in evidence.

Mr. Miller: No objection. No objection, if your Honor pleases, except it is conceded that this is a blow-up or magnification of an aerial photograph which we presume is authentic, except that there have been added various structures and titles and words to the photograph, is that correct?

Mr. Charles: That is correct, which I will tie in to the photograph.

(Received in evidence and marked Plaintiff's Exhibit 2.)

The Court: In what area of the Town of Hempstead is this pit located?

Mr. Miller: East Meadow.

OFFER IN EVIDENCE

The Court: Mr. Charles, do you want this map on an easel, or did you just offer it in evidence?

Mr. Charles: I just offered it in evidence. I do not need it on an easel at the present time. My main point in offering it was for the purpose of showing the area.

Mr. Dinkelmeyer.

JOHN DINKELMEYER, residing at 90 Hilltop Road, Levittown, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Mr. Charles: Maybe we had better have the aerial photograph, Plaintiff's Exhibit 2, on the easel, your [fol. 34] Honor, because this is with respect to the number of children in the neighborhood attending school in the neighborhood.

Direct examination.

By Mr. Charles:

Q. Mr. Dinkelmeyer, where are you employed?
A. I am employed at the North Bellmore Public Schools.
Q. What is that commonly known as?
A. Union Free School District No. 4.
Q. In what capacity?
A. I am the district principal of the district.
Q. As district principal are you in charge of the registration records of that school?
A. Yes.
Q. They are kept under your control?
A. That is correct.
Q. They are kept in the ordinary course of business?
A. That is correct.
Q. When was the last time you had a recapitulation of the total number of students in that school?
A. May 29.
Q. 1959?
A. 1959.
Q. Will you tell us how many students there were in that school?
A. Which school are you referring to, sir?
Q. The Jacob Gunther Elementary High School.
A. The Jacob Gunther Elementary School, we have an enrollment of 600 children.
Q. I show you Plaintiff's Exhibit 2 and ask you if you recognize that school from the aerial map.
A. Yes, right here (indicating).

Q. Would you point out to his Honor where it is.
A. Yes (indicating).

Mr. Charles: Your witness.

[fol. 35] Cross examination.

By Mr. Miller:

Q. Do you know, sir, where the line is between Union Free School No. 4, your district, and District No. 3 of the East Meadow School District?
A. Yes, sir.
Q. Will you point that out, please?
A. The boundary line between the two districts runs along North Jerusalem Road through the midpoint of that road westward to Newbridge Road and then down again North Jerusalem Road down to Ennebrock Road at this point, it goes slightly south through Ennebrock, the midpoint of that road, and back again to North Jerusalem Road, over to Bellmore Avenue, approximately.
Q. If I may approach here, may I have that pointer. Am I correct, then, that no one north of Jerusalem Road, no one north of where I hold this pointer, no children would walk from any point north of this line I am drawing down to this school?

Mr. Charles: I object to that, your Honor.
The Court: I will allow it, Mr. Charles.

Q. Is that not correct?
A. Let me understand the question.
Q. You made a boundary line about here, did you not?
A. Yes.
Q. Am I correct that everything above this is District 3?
A. Correct.
Q. Therefore, any child living above this would not go to this school?
A. That is correct.
Q. Then it is correct that south or below this pointer in this area here the children would walk to this school, [fol. 36] is that it?

A. Anyone south of this road would attend either Gunther School or our Waldorf School which is located right here.

Q. And this is an elementary school, sir?

A. That is correct.

Q. What is your mileage distance? That is, how far do you have to live from this school before you qualify for transportation by bus?

A. The mileage for the first three grades is a half mile or more; for grades 4 through 6 it is one mile or more.

Q. Can you point out to his Honor where approximately the transportation would start for students attending the Gunther School?

A. The transportation we have is mainly in this area over here (indicating). We have none from this area attending this particular school. The people from this area would attend our Waldorf Avenue School over here.

Q. Sir, when you say "this area here," you are pointing to an area south of North Jerusalem Road?

A. That is correct.

Q. And to the west of Newbridge Avenue. is that correct?

A. That is right.

Q. And when you said just before "this here", as to where they are transported, you were then pointing to the lower right corner of the map where it reads "Prepared by Lockwood, Kessler & Bartlett, Inc."?

A. The question you asked was bus transportation. We do have children coming from this area who walk, but bus transportation is from this area only.

Q. Now let me ask you this, sir: Do you understand that the subject property of this lawsuit is this area here (indicating)? This sand pit?

A. Yes.

[fol. 37] Q. Is there any child attending your school district who has to walk by this sand pit to get to school?

A. No, sir.

Mr. Miller: That is all.

Mr. Charles: That is all.

(The witness was excused.)

FREDERICK SHORE, residing at 80-35 262nd Street, Floral Park, New York, called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Charles:

Q. Mr. Shore, where are you employed?
A. East Meadow Public Schools.
Q. In what capacity?
A. Administrative assistant in charge of child accounting, Government aid, and transportation.
Q. In the East Meadow School District is the Newbridge Road School, the Prospect Avenue School, and the Woodland Junior High School located?
A. Yes, those are in our district.
Q. As administrative assistant are you in charge of the registration records of all three of those schools?
A. I am in charge for the entire district. Those registration records are sent to my office, that is right, for consolidation.
Q. And they are kept in the ordinary course of business?
A. Yes.
Q. Can you tell us, when was the last time you had a recapitulation of the registration of children, of students at the Newbridge School?
A. Let me put it this way: The reports must be sub-[fol. 38] mitted monthly to my office, and the last recapitulation was completed June 15.
Q. How many children were attending the Newbridge School on that day?
A. No, sir, this is as of May 29 but it takes a little while to consolidate. So, as of May 29, 1959, there were 1,119 children in Newbridge Road School.
Q. In accordance with your records, was May 29, 1959 the last registration at the Prospect Avenue School?
A. Yes, this is standard for the whole district.
Q. On May 29, 1959, what was the registration of students in the Prospect Avenue School?
A. 1,096.

Q. At the Woodland Junior High School did you also have a recapitulation of registration on May 29, 1959?

A. Yes, sir.

Q. What was the number of students attending the school on that day?

A. 1,697.

Q. I show you Plaintiff's Exhibit 2 and I ask you to point out to the Court the location of the Woodland Junior High School.

A. This would be Woodland Junior High (indicating).

Q. That is at the westerly end of the circle that is shown on Plaintiff's Exhibit 2. Would you also show us the location of the Prospect Avenue School?

A. That is a little above, over here; slightly to the northwest, about a quarter of a mile, sir.

Q. Would you also point out on Plaintiff's Exhibit 2 the location of Woodland Junior High School?

A. We had Woodland. You mean Newbridge?

Q. Newbridge.

A. Newbridge Road School would be here generally to the east, slightly to the northeast of these two.

[fol. 39] Q. And slightly to the northeast of the portion of the exhibit marked "sand pit"?

A. Yes.

Mr. Charles: Your witness.

Cross examination.

By Mr. Miller:

Q. Mr. Shore, have you been told the size of this circle?

A. No, I haven't heard about any of the details about this before.

Mr. Miller: Mr. Charles, will you concede that the radius of that circle is 4,500 feet, according to the affidavit in this action of Mr. Ott?

Mr. Charles: No, the radius of the circle is 3,000 feet.

Mr. Miller: I believe that is what he said; maybe I read it wrong. Just a minute.

For the record, if your Honor please, the affidavit on the motion for temporary injunction, page 3, of Mr. Ott,

I read: "Heretofore and on March 25, 1959 I caused to be made an aerial photograph of the said sand pit and showed on said photograph all the public buildings and private homes within a radius of approximately 4,500 feet from the center of said sand pit. Copy of said aerial photograph is hereto annexed and marked Exhibit E."

Mr. Charles: That is correct. Off the record, that goes from here to here to here to here (indicating the four corners of Plaintiff's Exhibit 2). It is not the circle shown on there.

[fol. 40] The Court: Does the affidavit say "circle", Mr. Miller?

Mr. Miller: It says within a radius of approximately 4,500 feet, and they have drawn a circle on the map. I can only presume that radius is one-half the circle.

The Court: Let us not presume.

Mr. Miller: That is what I was asking.

The Court: The affidavit says nothing about the circle.

Mr. Miller: No, it does not say "circle", I realize that.

The Court: Under the circumstances, then, we will develop this case on the basis of evidence introduced at this trial.

Q. Mr. Shore, looking towards the northeast boundary of the sand pit (referring to Plaintiff's Exhibit 2), can you tell me, sir, where the children who live along in this section, northeast corner of the sand pit, go to school?

A. Depending on grade, they would attend the Newbridge Road School. The elementary school children would attend the Newbridge Road School.

Q. And that is this school here (indicating)?

A. Yes.

Q. And further to the northeast?

A. Yes.

Q. From where these homes are in the northeast corner of the pit?

A. That is correct.

Q. Am I correct, sir, then, that none of these children would traverse the area of the pit to go to school? The pit is away from their homes, is that not correct?

A. Where are you pointing, Mr. Miller?

Q. Take anybody, say, in the area from Newbridge Road westerly to the sand pit and the entire northeast

[fol. 41] quadrant of the sand pit looking in a northeasterly direction; am I not correct that the people would walk away from the pit to the Newbridge Road School?

A. For those children.

Mr. Charles: I object to that, your Honor, on the grounds it is an assumption.

The Court: On redirect you have Mr. Shore outline for us on the map the outline of the district.

Q. Is that correct?

A. Those children where you are pointing would attend the Newbridge Road School.

Q. That is right, sir. Would any of those children traverse the sand pit area on their way to school?

Mr. Charles: I object to that, your Honor.

The Court: He is in no position to know whether they would or not. They might go in a roundabout way. All he can say is that the homes of those children in that district lie between the sand pit and the school. From then on we draw our own conclusions, Mr. Miller.

Q. Mr. Shore, let us take the northernmost corner of the pit and going slightly to the north northwest, if you would draw a compass angle that way, so we would be about at this point; is that correct?

A. Yes.

Q. On a north northwest tangent from the pit?

A. Right.

[fol. 42] Q. Let us take grade school first, where would grade school children living in this north northwest quadrant attend school?

A. There would be a split at that point.

Q. Would you tell the Court where they would go, please?

A. Some of them would attend, in elementary grades, the Newbridge Road School.

Q. Would they be furnished bus transportation?

A. If they were below the third grade. Kindergarten, 1 and 2 would receive bus transportation.

Q. Would be picked up by bus in their dwelling area and taken to the school?

A. Along a route, yes.
Q. Along the route?
A. Yes.
Q. And above that?
A. Above that in grades 3 and above to the sixth grade they would be in the Newbridge School up to a certain street, and beyond that they might attend the Meadowlawn School, and above another grade they would be in Woodland Junior High School, or perhaps the Meadowbrook Junior High School, or East Meadow High School.
Q. Now taking the homes that lie to the west of the sand pit, I believe this is the area known as Midland Gardens, is it not?
A. Yes.
Q. Where would the grade school children attend school from Midland Gardens on the west of the sand pit?
A. I might add, to clarify it, Newbridge Avenue is the boundary line, so west of the sand pit they would be in Woodland or Prospect, in grades, depending upon what grade they are in. Woodland or Prospect.
Q. You say Newbridge Avenue, which is this long street here which goes right by the pit—right?—is the boundary [fol. 43] line?
A. Elementary area boundary line, correct.
Q. In other words, am I correct, when you say "boundary line", anyone to the south southwest, would go to these schools (indicating)?
A. Yes.
Q. Located on this diagram to the west?
A. Right.
Q. And anybody living then on the other side of Newbridge Avenue would go up to Newbridge Road School?
A. In elementary grades.
Q. In elementary grades?
A. Correct.
Q. You said the children here in Grades 1, 2 and 3 would receive bus transportation?
A. K, 1 and 2.
Q. The first three grades includes kindergarten?
A. Right.

Q. What is your distance requirement or policy with respect to providing transportation?

A. Grades kindergarten, 1 and 2, over a half a mile; Grades 3, 4, 5, 6, over a mile; Grades 7 to 12, over a mile and a half. Bus transportation is provided if the children reside in those grades in excess of those distances from school.

Q. Are you personally familiar with Newbridge Avenue in the vicinity of the sand pit?

A. Yes, sir.

Q. Along the northeasterly side, that is the side where the pit is on Newbridge Avenue, are there sidewalks constructed?

A. Not all the way up and down. Generally, there are some sidewalks.

Q. Are there sidewalks on the southwesterly side of Newbridge across the street from the sand pit?

A. I would say generally yes, but here and there there may be none.

[fol. 44] Mr. Miller: No further questions.

COLLOQUY

Mr. Charles: Mr. Miller, it is stipulated that if the pastor of St. Raphael's Church, which is located on Plaintiff's Exhibit 2 at a point directly east of the east side of the southern part of the pit, were called, he would testify that 3,500 pupils receive weekly religious instructions in each week. Is that correct?

Mr. Miller: I will make that concession. When you say "weekly", are they in attendance every day?

Mr. Charles: Let me put it another way: that in each week 3,500 pupils receive religious instruction over the week—strike that out.

The Court: Is that 3,500 separate individuals?

Mr. Charles: 3,500 separate individual children receive religious instruction during one week at St. Raphael's Church.

Mr. Miller: Off the record, I am trying to understand this. Do you mean, for instance, an average of 700 a day,

some come once a week, some twice a week, some three times a week? Is that it?

Mr. Charles: That is right.

Mr. Miller: But are there 3,500 separate children?

Mr. Charles: No.

Mr. Miller: Then there would not be 3,500 separate children.

Mr. Charles: For instance, on Sunday they may have 800; then they have religious instruction for the high school children at night, they may have 300 for the high [fol. 45] school children not attending parochial schools, and he did tell me that the average was 3,500 pupils in a week.

Mr. Miller: Mr. Charles, if you would repeat that on the record I will take that.

The Court: Then, to help Mr. Miller, you would say that was about 700 per day?

Mr. Charles: Yes, sir.

Mr. Miller: I will take your previous statements if you would put them on the record now as to the explanation of the gross figure of 3,500.

Mr. Charles, as to just one statement which you made, when you located the approximate distance of the church to the pit I believe you said at the corner of the pit. I would like the record to indicate that it is some distance down Pendroy Street that the church and school are located on the corner of Newbridge Road, which is State Highway 106.

If your Honor please, the church is located on the corner of Newbridge Road, State Highway 106 and Pendroy Street, which is some distance down to the end of Pendroy Street and then some other land toward the pit. I think Mr. Charles inadvertently said the church is located at the northeast corner of the pit.

The Court: All right.

Mr. Charles: It is approximately 600 feet east of the pit.

Mr. Charles: No more questions.

Mr. Miller: No further questions.

(The witness was excused.)

[fol. 46] FREDERICK C. OTT, residing at 1 Irene Lane North, Plainview, New York, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Charles:

Q. Mr. Ott, what is your profession?
A. A land surveyor.
Q. Are you licensed by the State of New York?
A. I am.
Q. How long have you been so licensed?
A. Twenty-eight to twenty-nine years.
Q. Where are you employed at the present time?
A. Lockwood, Kessler & Bartlett.
Q. Where are they?
A. Syosset.
Q. Of Syosset, Long Island?
A. That's right.
Q. How long have you been employed by Lockwood, Kessler & Bartlett?
A. Seventeen years.
Q. Are they registered professional engineers and land surveyors in the State of New York?
A. They are.
Q. Did you, Mr. Ott, supervise the making of topographical survey on the premises known as Section 50, Block L, Lot 9, on the land and tax map of the County of Nassau?
A. I did.
Q. Mr. Ott, I show you this paper and I ask you what it is. Will you describe it to the Court.
A. This is a plotting of the topographical survey of the sand pit located in East Meadow, plotted from actual field notes which were obtained from March 26 to April 9, 1959. This survey indicates elevations on the surface of the ground and also elevations taken in and on the bottom of the pit below water.
Q. Was that survey made under your personal supervision?
A. It was.

[fol. 47] Q. Is it an accurate portrayal of the conditions you found on the dates that you have set forth on which the survey was made?

A. It is.

OFFERS IN EVIDENCE

Mr. Charles: I offer it in evidence.

Mr. Miller: No objection.

(Received in evidence and marked Plaintiff's Exhibit 3.)

Q. Did you also prepare at the time you made that survey, Mr. Ott, an index of cross-sections?

A. We did.

Q. Have you got those with you?

A. I have.

Q. I show you these papers and ask you if that is an index of the cross-sections.

A. Yes, this is the index to cross-sections with the cross-sections attached to it.

Q. Are they an accurate transcription of your field notes?

A. They are.

Mr. Charles: I offer the cross-sections in evidence.

The Court: Do you want to say something to Mr. Charles?

The Witness: Yes, about the previous exhibit.

The Court: We will wait until Mr. Miller finishes looking at it and then Mr. Charles will ask you a question.

Mr. Miller: I have no objection.

That is twelve sheets as one exhibit?

Mr. Charles: Yes.

(Received in evidence and marked Plaintiff's Exhibit 4.)

[fol. 48] Q. Mr. Ott, I show you Plaintiff's Exhibit 3 and I call your attention to the line on the east side of Newbridge Avenue which says 6 foot high cyclone fence, and I ask you if that cyclone fence is on the property line of the property which is the subject matter of this action.

A. Yes.

Q. Now I call your attention to cross-section marked Section A, Plaintiff's Exhibit 4, and I ask you if the slope of the pit as shown on Section A exceeds a maximum slope of one foot vertical on two foot horizontal?

A. It does, in part.

Q. Does it show whether or not the pit is over 10 feet in depth below the existing road grade?

A. It does.

Q. To what extent?

A. On Section A the depth is 48.6 feet from the existing road grade to the bottom of the pit.

Q. How far below grade is it to the ground water elevation?

A. 15.4 feet.

Q. So that at that point the depth of the water in the pit is 33.2 feet, is that correct?

A. That is correct.

Q. I call your attention to Section C of Exhibit 4, and I ask you whether the start of the slope of the pit is within 20 feet of the property line as shown by the 6-foot cyclone fence.

A. It is.

Q. To what extent?

A. The distance from the top of the slope, beginning of the embankment, to the fence on the property line is 17 feet.

Q. Is the bottom of the pit at that point more than 10 feet below the grade of the nearest street?

A. It is.

Q. What is the depth of the pit?

[fol. 49] A. The depth of the pit below the existing road grade on Section C is 59.7 feet.

Q. Is the pit at that point below the maximum ground water level as fixed? I will withdraw that.

Is the bottom of the pit there as shown on Section C below the ground water elevation?

A. It is.

Q. To what depth?

A. 40.1 feet.

Q. What is the depth of the water at that point?

A. The same: 40.1 feet.

Q. I direct your attention to Section E of Plaintiff's Exhibit 4, and I ask you if the start of the slope is within 20 feet of the nearest property line?

A. It is less than 20 feet.

Q. How far is it from the property line?

A. 10 feet.

Q. I ask you whether on Section C the bottom is deeper than 10 feet of the existing road grade.

A. The bottom of the pit is greater than 10 feet below the existing road grade.

Q. What is the depth of the bottom of the pit?

A. Below the existing road grade?

Q. Below the existing.

A. 59.7 feet.

Q. Can you tell us what the depth of the water is at that point?

A. 40.1 feet.

Q. I call your attention to Section F, and I ask you whether or not the slope begins within 20 feet of the nearest property line.

A. It is less than 20 feet from the property line.

Q. What is the length?

A. 13 feet.

Q. Now I call your attention to the slope of the pit and ask you whether or not that exceeds a maximum of 1 foot vertical to 2 foot horizontal.

A. It does.

[fol. 50] Q. I also ask you whether or not the bottom of the pit exceeds the ground water level.

(The question was read.)

Q. Is deeper than the ground water level.

A. Oh, yes. "Yes" to the last question.

Q. What is the depth of the pit as shown on Section F?

A. The depth of the pit below the existing road grade is 52.6 feet.

Q. Can you tell us the depth of the water in that pit?

A. On Section F?

Q. On Section F.

A. The depth of water is 37.0 feet.

Q. I call your attention to Section G, and I ask you whether or not the slope of the pit exceeds a slope of more than 1 foot vertical on 2 foot horizontal.

A. It does in part.

Q. And the part where it does not exceed 2 feet horizontal and 1 foot vertical, is that land under water?

A. That is.

Q. Is the land that is shown on Section G of Plaintiff's Exhibit 4 below the existing road grade?

A. It is.

Q. To what depth?

A. 62.1 feet.

Q. At that point what is the depth of the water in the pit?

A. 48.3 feet.

Q. I call your attention to Section J, and I ask you if the slope of the pit as shown on that section exceeds a maximum slope of 2 foot horizontal on 1 foot vertical.

A. It does in part.

Q. Does it also show whether or not the bottom of the pit is 10 feet below existing road grades?

A. It does.

Q. What is the depth of the pit at that point?

A. 50.7 feet below the existing road grade.

[fol. 51] Q. What is the depth of the water at that point?

A. 35.2 feet.

Q. I call your attention to Section K of Plaintiff's Exhibit 4, and I ask you if the slope of the pit begins within 20 feet of the nearest property line.

A. It does, less than 20 feet.

Q. Is the depth of the pit more than 10 feet below the existing road grades?

A. It is.

Q. What is the depth of the pit at that point?

A. 49.6 feet.

Q. What is the depth of the water at that point?

A. 34.1 feet.

Q. Now I show you Plaintiff's Exhibit 3 and I ask you whether or not the land lying between the lines marked "water line" on the east and "water line" on the north and "water line" on the west and "water line" on the south are the periphery of the pit, the part of the pit in which there is water.

A. Yes.

Q. What is the area of that part of the pit that was land within those water lines?

A. 20.2 acres.

Q. In the center of that land lying between those water lines you have a quotation which reads, "Water elev. 50.2." Will you tell the Court what that means as applied to Plaintiff's Exhibit 3.

A. "Water elev." denotes water elevation of 50.2 feet, which was obtained by running levels with instruments by our survey crews from bench marks established by the Nassau County. The elevations are referred to the basic datum of Nassau County, which is the same as mean sea level at Sandy Hook or the United States Coast & Geodetic Survey datum. Any number on there denotes the elevation of that specific point; and if it were to read as, for example, the surface of the water 50.2, it means that the water sur- [fol. 52] face of the pond in the pit at the time we made the survey was 50.2 feet above mean sea level at Sandy Hook, or 50.2 feet above the datum of Nassau County.

Q. In a layman's terms, is that the point at which ponds start to form out of the surrounding lands?

A. I am sorry, I would like to have that question repeated.

Q. I will withdraw it. Based upon that, can you tell us whether or not the land lying within the two lines are 2 feet above the mean water level of the Town of Hempstead at this point?

A. By the elevations shown within the edges of the water, I can tell that no points within the water lines are 2 feet above the ground water surface in Nassau County at this point.

Mr. Miller: If your Honor please, I did not quite understand that. Could I have that answer read back, please?

(The answer was read.)

Q. From Plaintiff's Exhibit 3 and from the lands lying within the lines as shown on Plaintiff's Exhibit 3, called "high water line," can you tell us whether an excavation has been made which is below 2 feet above the maximum ground level water level as shown on the survey?

Mr. Miller: If your Honor please, could we just suspend for one minute. The question used the words "high water level." Could you show me where you mean high water level?

Mr. Charles: Off the record.

(Discussion off the record.)

[fol. 53] Mr. Miller: Just for the record, then, you will amend the question to take the word "high" out of it, is that right?

Mr. Charles: Right.

Q. Is the excavation shown between the lines marked "water line" below 2 feet above the maximum ground water level at the site?

A. It is.

Q. What is the average depth of the water on the lands shown between the water lines on Plaintiff's Exhibit 3?

A. About 25 feet.

Q. Mr. Ott, at the time you made this survey did you make an inspection of the fence around the pit?

A. I did.

Q. Did you find any concrete curb under the fence supporting the fence?

A. I did not, except for concrete around the posts.

Q. But between the posts there was no concrete curb?

A. That is right.

Q. At the time you examined the fence did you find any holes under the fence?

A. I did.

Q. Did you cause to be taken any photographs of those holes in the fence?

A. I did.

Q. Were you present at the time the photographs were made?

A. I was.

Q. I show you these two photographs and I ask you if they are an accurate representation of the holes under the fence that you saw at the time the photographs were taken.

A. They are.

Mr. Charles: I ask that they be marked in evidence.

Mr. Miller: No objection.

(Received in evidence and marked Plaintiff's Exhibits 5A and 5B, respectively.)

[fol. 54] Q. At the time you made this survey were you also present when certain photographs were taken of the pit?

A. I was.

Q. I show you these twenty-two photographs, and I ask you if they are accurate representations of what you saw on the day the photographs were taken.

A. They are.

Mr. Charles: I offer them in evidence.

I think they ought to be marked separately.

(Received in evidence and marked Plaintiff's Exhibits 6A through 6V, respectively.)

Q. Mr. Ott, I call your attention to sheet 1 of Plaintiff's Exhibit 4, and did you at my request locate the point where each of these photographs was taken.

A. I did.

Q. Did you coordinate the photographs with the number as shown on sheet 1?

A. We did.

Q. Where the dot is was where the photograph was taken?

A. Yes.

Q. And the arrow points to the direction in which the camera was pointed?

A. That is right.

Mr. Charles: If you look at the last, your Honor, just for the sake of convenience you see that number, the last number on the right on the upper part.

The Court: 59-20-15.

Mr. Charles: If you look at Section 1 of Plaintiff's Exhibit 4, you will see a numeral 15 at Everett Place, and that is where the photograph was taken. The arrow is the [fol. 55] direction in which the camera was pointed at the time the photograph was taken.

The Court: So that if I take Exhibit 4 and look for the number, as on this one, 6A, and find the upper right-hand corner the number 5920-15, that 15 will be the same number as on this first sheet of Exhibit 4.

Mr. Charles: That is correct, sir. You always get into controversy as to where the camera was and who took it and where it was, and I thought it would be much simpler to present it in this manner.

The Court: All right. Have you done this or had this done for each one of these photographs?

Mr. Charles: Yes, sir.

The Court: That is your understanding too, Mr. Miller?

Mr. Miller: Yes, except that I do not have a sheet with the arrows on it. If you have an extra one, it will be easier for us to find.

Mr. Charles: Yes, we have an extra one.

Q. Mr. Ott, you are also familiar with Plaintiff's Exhibit 2 which is the aerial map?

A. Yes.

Q. Will you tell the Court the radius of the circle as shown by the yellow line on Plaintiff's Exhibit 2?

A. Yes, the radius of the yellow line is 3,000 foot.

Q. Is it 3,000 foot from the center of the sand pit?

A. That is right.

Mr. Charles: Your witness.

[fol. 56] Cross examination.

By Mr. Miller:

Q. Mr. Ott, would you point out for me, please, what point you considered in the sand pit for the center of that circle?

A. Right here.

Q. About at this point?

A. That is right.

Mr. Charles: Let him identify it.

The witness marked it.

Mr. Miller: The witness marked just above the letter C in the word "Block" on the island of land sitting in the center of the lake.

Mr. Charles: With the red crayon.

Q. Mr. Ott, you said you made an examination of the fence which encloses this sand pit, is that correct?

A. That is right.

Q. And you found several openings underneath that and took Exhibit 5A and 5B?

A. That is correct.

Q. And the holes as shown on those exhibits, is that the condition that you found in the land as you came by that point?

A. That is correct.

Q. Were those the only such conditions you found? I mean did you traverse the whole perimeter of the pit?

A. I traversed the whole area of the pit and those were the ones that I found.

Q. You did not find any others, in other words?

A. No.

Q. How many linear feet of fence surround this thirty-eight-acre sand pit?

A. About a mile.

Q. Do I take it, then, approximately 5,300 feet of fence?

A. That is about correct.

Q. I am correct, then, in 5,300 linear feet of fence you found two holes under the fence?

A. Yes.

[fol. 57] Q. Would you look, please, at Plaintiff's Exhibits 5A and 5B. Is it not correct that there is a ruler or measuring stick shown in the photographs to graphically illustrate the depth of the hole?

A. That is right.

Q. And in Exhibit 5A, which is the one with the metal bar, it looks like, also in the picture—is that correct?

A. That is 5B, I am sorry.

Q. All right, take the one with the bar.

A. That is 5B.

Q. In Exhibit 5B, the one with the crossbar, what is the depth of the hole at the point that the ruler is?

A. Approximately 10, 11 inches.

Q. Looking slightly to the left of the ruler as you look at the photograph, does not the land slope up to the concrete base of the fence post?

A. It does.

Q. So that if the ruler were held to the left, the distance would be shorter, the hole would be smaller underneath the fence, would it not?

A. That is right.

Q. Would you point that out to his Honor, please, as you are testifying.

A. Yes.

Q. Now going to the right of that stick, does not the hole also lessen in depth as you work your way up the slope of the other side of the hole?

A. That is correct.

Q. In other words, you measured it with the measuring device or ruler at the deepest point or center of the hole?

A. I did.

Q. Did you lie down on the ground next to that fence, Mr. Ott?

A. No, I didn't.

Q. Do you know of your own knowledge the size of a hole that would be necessary for you to draw your body under the fence?

A. Me?

[fol. 58] Q. Yes.

A. Yes.

Q. Approximately how much, sir?

A. It would be controlled by the diameter of my head, and my head, I guess, is about—I wear a 7¼ hat, so that I could crawl through this hole if this pipe was not there.

Q. Do I take it, then, sir, that the size of your shoulders would have nothing to do with the size of the hole under the fence? You said determined by your head, did you not?

A. That's right.

Q. Am I correct, then, that the size of your shoulders would have nothing to do with your ability to get under that hole?

A. This specific hole, my shoulders could fit under, because the hole, as you have just described, was 10 to 11 inches deep at its deepest part, then sloped up on each side of it; so that I, though I didn't get down on my belly

and crawl through here, could have crawled through this hole, there would have been sufficient room.

Q. Do you know, sir, how wide your shoulders are?

A. Well, I never measured my shoulders.

Q. There is a rule here, sir.

Mr. Miller: Would you hand this to the witness, please.

The Witness: You read it.

Mr. Miller: All right. Mr. Charles, would you come here. What would you make that out to be? Shall we call it 18?

Q. All right, sir, we have just measured your shoulders and come to a conclusion that it is approximately 18 inches from left to right. Now I ask you, sir, looking at Plain-
[fol. 59] tiff's Exhibit 5B in evidence, what the dimensions of the hole are from left to right as you look at the hole of a depth sufficient for your head and shoulders to fit underneath the bottom rung of the fence.

A. There is a rule standing vertically here; it is opened at 1 foot. I would say that the width of the hole at the top would be 2 feet and it would vary down to foot and a half at the bottom.

Q. On Plaintiff's Exhibit 5B in evidence where does the bottom rung—when I say "rung," I mean the two points of fence wire which are twisted together and then end—do you follow me?

A. Yes, I do follow you.

Q. Each one comes down into a little stick, like, where two strands are coiled together.

A. The fence at this particular point, and this is called a chain-link fence, the bottom of it was bent inward, inward being towards the pit, and I think you can see it in the picture.

The Court: The witness is showing me the fence at the bottom, how it turns in.

Q. So that is it not correct, sir, that the bottom-most portion of the fence—I am not talking about the post; I am talking about these little points which stick down—when they hang in their normal position as to the left of

where you just described, the depth of the hole is substantially less than what you have shown with that measurement? Is that not correct?

A. Yes.

Q. In fact, sir, from this photograph would you say that that measuring stick was held in a perfectly perpendicular way, or is it on an angle?

A. The picture indicates that it is slightly out of perpendicular.

[fol. 60] Q. If it were perfectly perpendicular forming a 90-degree angle at the bottom of the hole, would not the distance be less than that shown?

A. You are speaking theoretically?

Q. Assuming that you held it in a—

A. Because we are measuring to a fence which has knurled bottoms or points, and the rule was put in such a manner as to give a comparison of size, of recognizable size. But if that were brought into perpendicular, the difference in the measurement would be so infinitesimally small it would be—because it is only about three-eighths of an inch out of plumb.

Q. At the time you came up to this spot to take this picture was this pipe there?

A. It was.

Q. Did you find that there?

A. It was.

Q. And that pipe, the portion which is going through the fence, is fastened to the crossbar which is shown on other side, is it not?

A. That is right.

Q. In so far as your ability to crawl under that fence, would not that bar take up part of the hole?

A. Oh, yes.

Q. In fact, sir, had you been so inclined at the time you saw the representation shown on this photograph, could you physically have gone through there?

A. While the pipe was there?

Q. Yes.

A. No.

Q. Will you look at the other photograph, please, Exhibit A, and am I correct there, sir, that the measuring

device is placed at the greatest depth of the hole?

A. Not in this particular case, as I look at the picture.

Q. Where is it greater?

A. Brought over to the left it would have represented a slightly greater dimension of hole.

[fol. 61] Q. Is it not a fact, sir, that to the left the prongs extend further down?

A. That is correct.

Q. And that would narrow the size of the hole, would it not?

A. That is correct.

The Court: What number picture are you looking at now?

The Witness: Exhibit 5A.

Q. Mr. Ott, did you in the past week visit the sand pit?

A. I did.

Q. Did you request permission to examine the area?

A. I didn't request permission.

Q. Did you have a conversation with anybody there at the time?

A. I did.

Q. With whom was that conversation?

A. Mr. Goldblatt.

Q. What did you say to him and what did he say to you?

A. I indicated to Mr. Goldblatt that I was entering upon the property.

Q. Did you ask permission to enter?

A. Well, no, I didn't ask permission. It was a gesture of notifying the owner that I was going on the property.

Q. And he did not stop you, is that correct?

A. No, he didn't stop me.

Q. Did you examine the property?

A. I did.

Q. Did you examine around the periphery of the fence?

A. I did.

Q. Did you find any holes?

A. I did not.

Q. When for the first time did you ever visit the sand pit in East Meadow?

A. March 23, 1959.

Q. Did you have a conversation at that time with Mr. Goldblatt?

A. I did.

[fol. 62] Q. Did you tell him the purpose of your visit?

A. I did.

Q. What did you say to him and what did he say to you?

A. I said to Mr. Goldblatt, "We have been retained by the"—

Q. When you say "we," would you tell what you mean by "we"?

A. The firm I work for.

Q. All right.

A. "We have been retained to make a survey of your sand pit, and have we your permission to enter upon the premises." To the best of my memory, Mr. Goldblatt said, "Who are you working for?" And I said, "It is for Nassau County and/or Town of Hempstead."

He then requested that we get a letter from the owner indicating the purpose of the survey. That is the first visit to the sand pit.

Q. Did you deliver a letter to him, Mr. Ott?

A. Yes, the next day—hold it, March 25, I again saw—no, we didn't see Mr. Goldblatt; we saw his secretary. And we gave his secretary a letter which was written by Mr. Clarence Southard of the Nassau County Department of Public Works.

Q. Let me get one thing straight on the record. Who retained you to do any services at this sand pit?

A. Nassau County.

Q. Now I took it a minute ago you said Nassau County and/or Town of Hempstead. Did Town of Hempstead ever retain you on this?

A. At the beginning, March 3 was the first indication that we had that surveys were wanted at this pit.

Q. Did that indication come to you personally?

A. From the particular person who called me, yes.

Q. Who was the person who called you?

[fol. 63] Mr. Charles: I do not want to object, your Honor, but I think this is improper cross-examination.

The Court: I will allow it.

Mr. Charles: Exception.

A. Mr. Frank Merklin of the Nassau County Department of Public Works.

Q. He was the first person that ever called you and mentioned East Meadow or Goldblatt's pit?

A. That is right.

Q. What did he say to you at that time?

A. He said, "We want to have surveys of the pit."

Q. Did he mention any reason why he wanted surveys?

A. No.

Q. Were those the instructions under which you operated to go out three weeks later and do this work, that conversation with Mr. Merklin?

A. Two days later.

Q. I thought you said March 3.

A. No, I said March 23.

Q. I am sorry, then, I misunderstood you. It was March 23 Mr. Merklin called you?

A. That is right.

Q. And on the 25—

The Court: Mr. Miller, may I interrupt. Would you find a convenient time without interfering with your cross-examination to stop.

Mr. Miller: I can stop right now.

The Court: Suppose you stop right now.

Mr. Miller: There will not be any point where it will be easier.

The Court: We will recess until tomorrow morning.

[fol. 64]

Mineola, New York
June 17, 1959

Appearances as heretofore noted.

FREDERICK C. OTT resumed the stand and testified further as follows:

The Clerk: You are still under oath.

Cross examination.

By Mr. Miller (continued):

Q. Mr. Ott, when we suspended yesterday, I believe about the last question concerned the hiring of you—when I say "you" I mean your firm, Lockwood, Kessler & Bartlett—in connection with survey of the subject property of this lawsuit. As I recall, sir, about your last answer was that this hiring first was initiated, to your recollection, by the telephone call with Mr. Merklin of the Department of [fol. 65] Public Works of the County of Nassau. Is that correct?

A. That is correct.

Q. Would you tell the Court, please, what Mr. Merklin said to you and what you said to him in that conversation concerning this property?

A. Mr. Merklin outlined the survey that he desired we make of the sand pit. Specifically, he requested that we make a topographical survey of the entire pit, taking elevations at and on 50-foot grid intervals, which included taking soundings in the pond in the pit.

Q. Was that the sum and substance of your hiring?

A. That was the sum and substance of the request for the survey.

Q. Were there any other conversations with any other gentlemen at the Department of Public Works concerning the services that you were to render at the sand pit?

A. No, my entire talks were with Mr. Merklin.

Q. I believe also that you testified yesterday, if I am correct, that you went to the property of the defendant

Goldblatt not as a private consultant but in the nature of an agent of the County, Department of Public Works, and you delivered a memorandum at that time, did you not?

A. That is right.

Q. I show you a piece of paper and ask you, sir, if you can identify it as the paper which you delivered at that time.

A. This paper is the paper I delivered.

OFFERS IN EVIDENCE

Mr. Miller: I offer it in evidence.

The Court: When you say he went as an agent, you mean merely to deliver this document and that is all.

[fol. 66] Mr. Miller: No, as an agent of the County of Nassau.

The Court: That is a conclusion that you cannot ask.

Mr. Miller: I was recalling his testimony of yesterday, Judge.

The Court: He used the word "agent" yesterday?

Mr. Miller: I thought he said they went as agents of the County. Maybe I am wrong. The letter was—I will withdraw the word "agent". The letter reads "as associates of this Department," and it is the Department of Public Works.

I will withdraw the word as not having my memory control what was said, if your Honor please.

Mr. Charles: I object to the letter, your Honor, on the grounds that it is improper cross-examination and it is immaterial and irrelevant.

The Court: I suppose at this moment, Mr. Miller is making the witness his own on this issue. I will allow it.

Mr. Charles: Exception.

(Received in evidence and marked Defendant's Exhibit A.)

Q. After the delivery of Defendant's Exhibit A to the Goldblatts or someone in charge of the property, I believe you said the secretary, you then commenced your services, is that correct?

A. That is correct.

Q. To whom did you render the exhibits, 2 the aerial photograph, 3 the topographical map—these are plain-
[fol. 67] tiff's exhibits—4, the cross-sections, 5A and 5B, the perimeter fence shots, and Exhibit 6, the twenty-two photos? To whom were those delivered, sir, after they were completed?

A. They were delivered both to Mr. Richard Charles and to the County, with perhaps the exception of the photographs, yes, excepting the photographs.

Q. When you say Mr. Richard Charles, are you referring to the Special Counsel for the Town in this proceeding?

A. I am.

Q. At whose direction was a copy of the papers delivered to Mr. Charles?

A. Well, I don't know the particular person, but I would presume it was Mr. Merklin.

The Court: Do you know, Mr. Ott?

The Witness: I do not.

The Court: Then you do not know.

Q. As far as you know personally, the only one you dealt with was Mr. Merklin over at the Department of Public Works?

A. No, later on I dealt with Mr. Charles, too.

Q. In other words, I mean prior to Mr. Charles' entry into the picture.

A. I dealt with Mr. Merklin.

Q. Now I show you two photographs marked 17 and 18 and ask you if they are part of the same series of photographs which you took of which Plaintiff's Exhibit 6, twenty-two photographs, we have in evidence.

A. They appear to be; not bearing the stamp of the company I am employed by, I can't say that they are.

Q. Do they appear to be?

A. They appear to be, yes.

[fol. 68] Mr. Miller: Mr. Charles, may we stipulate for the record those were delivered to me by your associate this morning?

Mr. Charles: Yes.

Mr. Miller: I offer these in evidence.

Mr. Charles: No objection.

(Received in evidence and marked Defendant's Exhibits B-1 and B-2.)

Q. I show you a piece of paper, sir, and ask you—

The Court: Excuse me, would you mind having Mr. Ott tell us what these pictures represent?

Mr. Miller: Surely.

The Court: Otherwise they are just pictures.

Mr. Miller: All right, Judge.

Q. Mr. Ott, would you please take Plaintiff's Exhibit 4 in evidence, which is the cross sections and the index. Those were, I believe, shots 17 and 18, were they not?

A. Yes, they are so marked.

Q. According to your index to sections here, 17 appears just north of Everett Place, and 18 appears looking northerly in the same spot, does it not?

A. That is correct.

Q. Would you please, having reference to Plaintiff's Exhibit 4 in front of you, point out to his Honor just where those pictures were taken and what they show.

The Court: I think we have enough now. You point out that these are shots 17 and 18. All right.

[fol. 69] Mr. Miller: On the index of photos on the first page of Plaintiff's Exhibit 4.

The Court: I have enough identification now.

Q. Mr. Ott, these pictures portray, do they not, the berm or the perimeter of the pit from the point of excavation to the fence?

A. That is right.

Q. At that location?—

A. That is right.

Q. —as shown on the index. And having reference also to Plaintiff's Exhibit 4, would you tell me, sir, with reference to shot No. 18, and referring to sheet no. 5 or "D" of the cross sections, would you tell me the width of the berm as shown in shot No. 18?

A. A clarification of that question: Are you asking me for the width of the berm in this picture? You referred to 18.

Q. Yes. If I understand you correctly, and your index, shot No. 18 shows a northerly view taken from a point just north of Everett Place?

A. That is right.

Q. And looking with the arrow pointing to 18, you see just above it on your index sheet 5-D?

A. That is right.

Q. I would presume, therefore—tell me if I am right or wrong—that if you then looked at Section "D" of your cross sections, you would see the width of the berm as predicted in that photograph, would you not?

A. In the distance.

Q. Would you tell me, referring to Section "D," the width of the berm as shown in the distance there?

Mr. Charles: I object to that, your Honor, on the ground that it is immaterial and irrelevant.

[fol. 70] The Court: I will overrule your objection, Mr. Charles.

Mr. Charles: Exception.

A. The width of the berm as shown on Section "D" is 25 feet.

Q. You were questioned yesterday on direct examination with respect to the distances as shown on your cross sections from the fence to the point of excavation, and there was a series of questions as to whether the distance was less than 20 feet. Do you recall those questions?

A. I do.

Q. On your various cross sections you have depicted a 20-foot "min.", which I presume is minimum?

A. That is right.

Q. I ask you, sir, where did you get the term "minimum" for the 20 feet? What does that have relation to?

A. That has relation to the ordinance of the Town of Hempstead.

Q. You are referring to Ordinance No. 16 which is Plaintiff's Exhibit 1 in evidence?

A. I am.

Q. I show you that exhibit and ask you, sir, if you are referring to the provision of Section 4a.

A. I am.

Q. Do you know, sir, of your own knowledge, or can you refresh your recollection if you have to, when that provision first took effect?

A. I do not know.

Q. Do you have any knowledge as to whether there was ever a different provision in effect under a prior ordinance?

A. I do not know.

Q. Mr. Ott, I show you a notice to admit, which by way of clarification is a paper served by the defendant which the plaintiff has admitted in this action for the purpose of this action, that the ordinances attached thereto are true [fol. 71] and correct ordinances, and I ask you to look at the first ordinance which bears a date May 20, 1941. Do you see that, sir?

A. I do.

Q. That is denominated Article XVII of the Building

A. It is.

Code of the Town of Hempstead, is it not?

Q. I would ask you, sir, to direct your attention to Section 3 of that ordinance, and I pose the question to you, sir, that, having that ordinance in front of you—which is admitted for the purpose of this action—was there a prior provision of a dimension other than the 20 feet as specified in Plaintiff's Exhibit 1?

Mr. Charles: I object to that.

The Court: Mr. Miller, whether there is an objection or not, what is a question of law and what is a question of ordinances is a matter completely within the province of the court. This man is merely a member of a surveying firm.

Mr. Miller: I will withdraw the question.

Q. Mr. Ott, who told you to base your cross sections on a 20-foot minimum?

A. On a 50-foot—no, wait a while.

Q. I am referring to your notation on top of each cross section where you show the distance between the fence and the commencement of excavation, which you have denominated as minimum. Now I ask you, were you told to do that in the preparation of your papers?

A. I was.

Q. Or is that something you did automatically by yourself?

A. That is something which we developed on the basis of having been furnished a copy of the town ordinance.

[fol. 72] Q. Were you asked to show the minimum distance on each cross section?

A. No, not specifically. In the development of a portrayal of facts, which those sections indicate, we considered it advisable to show that 20-foot minimum, based upon the ordinance requirements.

Q. Also shown on your cross sections, Mr. Ott, there is a dotted line which bears a notation "2 over 1 max. slope" —I presume that is "maximum"; right?

A. Right.

Q. I ask you, sir, where or in what manner did you derive the term "2 on 1 max. slope"?

A. From the ordinance.

Q. That is the ordinance presented to you at this time, the current ordinance in effect?

A. The current one, not this one.

Q. You made no inspection of any prior ordinances, is that correct?

A. I did not.

Q. Would you examine, please, your cross sections, Mr. Ott, and tell me if there is any place where the distance between the fence and the commencement of excavation is less than 10 feet?

Mr. Charles: I object to that on the ground it is immaterial.

The Court: I will allow it.

Mr. Charles: Exception.

A. There are none in the sections.

Q. There are none in the sections?

A. Less than 10 feet.

Q. Thank you. Mr. Ott, if you were to use the phrase "within 10 feet," would I be correct that that means, if you used it, less than 10 feet?

A. That is correct.

Q. Mr. Ott, would you look at page 3 of an affidavit [fol. 73] signed "Frederick C. Ott" and sworn to April 23,

1959, before Mr. Mattison, associate counsel at the table here, particularly the first full paragraph on that page, and I quote now: "As appears from Exhibit B hereto annexed, and especially from Sections 'C', 'E', 'F' and 'K', the pit excavation is within 20 feet of the property line. In fact, as shown on Section 'E' of Exhibit B, the excavation commences within 10 feet of the property line at one point." Did I read that correctly, sir?

A. You did.

Q. Now I would ask you, sir, at this time, was that statement true when you made it?

Mr. Charles: I object to that, your Honor.

Mr. Miller: Cross examination, Judge.

Mr. Charles: It is merely argumentative.

The Court: I know it is cross examination.

Mr. Charles: Argumentative and improper cross examination.

The Court: I will allow it.

Mr. Charles: Exception.

Mr. Miller: Question withdrawn.

Q. That was a sworn affidavit, was it not?

A. At the time I signed this affidavit I swore to it.

Q. And your signature appears on the next page, does it not?

A. That is correct.

Q. Your testimony a few minutes ago was that there are none of the cross sections that show any place within 10 feet; is that not a fact?

A. Yes, on the interpretation of "within."

Q. Now I ask you, sir, when was it correct, your testimony today that there are no cross sections within 10 feet, [fol. 74] or your sworn statement in the affidavit that at one point shown on Section "E" of Exhibit B the excavation commences within 10 feet?

A. Might I answer that?

The Court: If you can, if you understand the question.

A. I think I do.

The Court: Then answer it.

A. And it is in the interpretation of the word "within."

Q. Did I not ask you— A. And the interpretation you made of the word "within."

Q. Mr. Ott, I do not want to quibble over words. Did I not ask you before—

The Court: No, we are not going to quibble; we are not quibbling. Mr. Ott is going to answer the question.

A. The measurements as indicated on the cross sections to the top edge of the slope embankment are shown to the nearest foot. Surveyors when indicating a measurement to the nearest foot imply that the accuracy of the measurement is within a half a foot either way of that nearest foot. So the usage of the word in this affidavit, "The excavation commences within 10 feet," is perhaps broadly used, as I have described when a surveyor shows a measurement to the foot. If he desired to be more accurate and if his measurements warranted such accuracy, he would indicate the nearest tenth of a foot, and that would imply [fol. 75] that that measurement was within a tenth either way of that measurement. Have I clarified that "within" as used in the affidavit could be entirely correct, because 9.9999 to infinity is still within or below 10 feet.

Q. Sir, do I take it that you have an independent recollection that this Section "E" was something less than a full 10, even be it 9.999 to infinity? Is that your testimony, sir?

A. My testimony is, on the basis of the cross sections we prepared, that as a land surveyor we do not indicate right on the sections anything which might be construed as being more accurate than it really is, and this was specifically shown at my direction to the nearest foot, because the edge of a bank is not a definite line, it varies slightly.

May I bring to your attention that the elevations are shown to the nearest tenth of a foot, the elevations, say, on Section "G", or any one of them, which implies that we have taken those elevations to accuracies within a tenth of a foot.

Q. You say you go to the nearest foot. What is the point of change? If it is, say, 9.51, does it become 10, or if it is 9.49 does it go back to 9?

A. Just about that, yes.

Q. Therefore, when you put 10 feet on Section "E" it could have been 10.1 or 10.2 just as well as 9.8 or 9.9, could it not?

A. Correct.

Q. Mr. Ott, I show you Plaintiff's Exhibits 5A and 5B in evidence, which are the pictures of the fence, and I ask you, did you have any knowledge as to who made those holes?

A. I did not.

Q. I would ask you, sir, if you will look at the affidavit —do you still have it in front of you?—on the motion, and look at the sentence just before the paragraph I read you before, and I read: "In addition, as appears from Ex- [fol. 76] hibits C and D hereto annexed, there are holes under the said fence which evidently have been dug by children for the purposes of ingress and egress." Do you recall making that statement in that affidavit?

A. I do.

Q. I ask you, sir, at this time, bearing in mind your previous testimony a couple of questions ago that you had no knowledge of how the holes were dug, on what did you base the statement in this affidavit that the holes evidently were dug by children?

A. By my experience.

Q. Did you ever hear of erosion by water pressure?

A. I do.

Q. Mr. Ott, if a stream of water were to flow continuously or during rainstorms at one spot under a fence, would you not cause a depression or hole because of the type of earth there?

A. Definitely not like this.

Q. Mr. Ott, is not just as plausible that an adult, as opposed to a child, could have dug that hole?

A. Did you say plausible?

Q. Yes.

A. Very improbable.

Q. But it is possible, is it not?

A. Possible, yes.

Q. Actually, you had no idea who dug it or how it was dug?

A. I answered that.

Q. That was merely your opinion, is that correct?

A. That is right.

Q. If you would, sir, refer again to Section "E" of your cross sections, sheet No. 6 of twelve sheets in Exhibit 4 in evidence, reading at the upper left-hand corner, as we said before, you would show a 10-foot distance from the fence to the commencement of the excavation, is that correct?

A. That is right.

[fol. 77] Q. And then the solid line is existing ground as shown by you?

A. That is right.

Q. Is it not a fact, sir, that the 2 on 1 maximum slope which you shown on a dotted line is a more severe cutting away than the existing ground at that cross section?

A. Yes.

Q. If the 2 on 1 slope were maintained, which you say is the requirement of the present ordinance, what would the width of the berm then be from the fence to the commencement of a 2 on 1 slope?

A. May I have that question read?

(The last question was read.)

A. I will answer you, as I think you intend the question. The 2 on 1 slope on Section "E" is plotted beginning at the 20-foot minimum from the fence. If the 2 on 1 slope were moved parallel to itself and began at the actual top of the bank which is 10 feet away, it would still have the same slope.

Q. What I was getting at is this, sir. Maybe I can ask you a question pointing to this a little better. According to your exhibit, it appears to me, and I want you to tell me whether I am right or wrong, that what you say is the permissible angle to cut is far sharper than the existing ground.

A. Oh, it is.

Q. Therefore, it would seem to me that you could take an awful lot of earth out of here and deposit a small amount in here to make this a 20-foot berm and then maintain the 2 on 1 slope?

A. That could be done on that particular section (referring to Section "E" on Plaintiff's Exhibit 4).

[fol. 78] Q. I show you, sir, Defendant's Exhibit E for Identification at an examination before trial of June 5, 1959, and ask you if you have ever seen this document before.

A. I have never seen this before.

Q. When you commenced your survey of the sand pit which is the topographical map up on the bulletin board, which is Plaintiff's Exhibit 3, with respect to the boundary lines or what you say are the confines of the sand pit, are those correlated or based upon any examination of deed or deed records or filed documents in the County Clerk's Office so as to determine the accuracy of the filed lot? Do you follow me?

A. It is.

Q. Was that so predicated?

A. Yes, it was correlated with the deed on record.

Q. Did you check the various distances? Was it a metes and bounds description in a deed that you checked against?

A. As I remember, it was.

Q. Then you checked, in other words, the angles as shown in the metes and bounds as well as the lineal feet shown on each course and distance?

A. Yes.

Q. I realize there are many, because it is irregular.

A. Yes.

Q. And the fence that you found surrounding the property, sir, is that fence on or about on the property line?

A. It is both, on or about the property line.

Q. I mean with possible variations, but for the sake of general discussion we would say it is on the line?

A. Yes, sir.

Q. I believe yesterday, sir, you said, when I asked you how many lineal feet there would be around the perimeter, [fol. 79] that is if you counted the number of feet of fence, you said about a mile?

A. Yes.

Q. Which would be 5,280 feet?

A. Yes.

Q. I ran a rough check of the distances and I came out with over 7,000 feet. Would you say it is possible it is over 7,000 feet?

A. Definitely.

Q. In 7,000 lineal feet you found only those two holes, is that correct?

A. Yes.

Q. In connection with the preparation of Plaintiff's Exhibit 3, did you make any computations as to the amount of cubic yardage of material which has already been removed from the sand pit?

A. Yes.

Q. Do you follow me, sir?

A. Yes.

Q. I am asking you first what has already been taken out, not the figure you would have to put back in. That will be my next question. I do not want you to be confused by the two questions. The question now on the record is—

A. As to all the material—

Q. Did you compute what was taken out?

A. No, except we roughed it out, because we can never compute what has been taken out without having a knowledge on a survey of the surface that existed before the start of the pit.

Q. Right. Did you know how long this pit was in operation?

A. Not definitely.

Q. Did you compute the amount of cubic yardage that would be required to bring that excavation back up nearer to level with nearest established grade, or any amount with relation to the established grade of the nearest abutting street?

A. That was, again, a rough computation.

Q. What was your computation on it?

A. Somewheres in excess of a million yards.

[fol. 80] Q. Did you make any computation of how many cubic yards remain in the sand pit to be mined therefrom?

A. We did not.

Q. The figure of some one million yards, sir, would that be a compacted figure?

A. I said it was roughed out.

Q. I believe in an affidavit in this case you have used the figure of 888,000 cubic yards?

A. I did, and that is a specific computation to a certain level which you have not asked in your questions.

Q. I ask you, sir, this question: In order to raise the bottom of the pit so as to bring it to a level of 2 feet above maximum ground water, did you compute the amount of cubic yards that would be required?

A. We did.

Q. And what was that figure, sir?

A. 880,000 cubic yards.

Q. Would that be a compacted figure?

A. That would be a compacted figure.

Q. In other words, you would have to bring in in excess of that figure and then it would settle down to that?

A. That is correct.

Q. That would be compacted or pressed down?

A. Yes.

Q. Has your firm billed for the services rendered in connection with this survey and map?

A. I don't know.

Q. Do you know, sir, to whom that bill will be rendered or was rendered, if it has already gone out?

A. I believe it will be to Nassau County.

The Court: Do you know?

The Witness: I do not. That is administration.

[fol. 81] Q. Mr. Ott, do you recall being examined before trial on June 6, 1959 by me in this building?

A. I do.

Q. I am reading now from page 28 of your examination, starting at line 22. Do you recall my asking this question:

"Question: Have you already billed or are you going to bill for your services at the sand pit?

"Answer: We are."

Do you recall that question and making that answer?

A. I do.

Q. Do you recall this question:

"Question: Now, to whom will that bill be rendered?
"Answer: To Mr. Clarence Southard, Deputy Commissioner of the Department of Public Works."

Do you recall that question and answer?
A. I do.

Q. "Question: To the County of Nassau?
"Answer: That's right."

Do you recall that question and answer?
A. I do.
Q. Does that refresh your recollection as to where your bill would go, sir?
A. Until the bill is sent, the answer to that question is correct, but until the bill is sent, I presume it is going to Nassau County.
Q. Is that because you know you were hired by Nassau County?
A. I would say that would be the inference.

[fol. 82] Mr. Miller: In connection with a line of questioning at this point, if your Honor please, I would like to offer in evidence the transcript of the stenographic minutes of a trial, Special Term, Part I, Nassau County, between the Town of Hempstead and East Meadow Realty Corp. and Builders Sand & Gravel Corp., the defendants. The trial was February 14 and 15, 1956. This is the trial before Mr. Justice Hill.
The Court: No, Mr. Miller, that is not a proper part of the plaintiff's direct case. When your turn comes, then we will decide whether that is allowable or not.
Mr. Miller: The only reason I offered it at this time, Judge, is that I was going to ask this man certain questions and the transcript has several references to activities and size of the pit in 1927.
The Court: You try to use it without getting the whole thing in evidence and see what happens.
Mr. Miller: All right.

Q. Now I believe you testified before, Mr. Ott, if I am correct, that you had no personal knowledge as to the time when this excavation commenced.
A. That is right.

Q. I would like, sir, to read you four or five lines from a transcript of the stenographic minutes of a trial and then ask you some questions in connection with the present physical surroundings of the pit.

The Court: Is it his testimony?

[fol. 83] Mr. Miller: No, it is not his testimony, Judge. This is to orient him in 1927.

The Court: I am afraid, if there is an objection, I am going to have to sustain it.

Mr. Charles: There is, sir.

Mr. Miller: Let me put the question this way:

Q. Mr. Ott, assuming that in 1927 there was a sand pit in East Meadow, Town of Hempstead, Nassau County, and assuming that there was an excavation which was 30 feet deep, there was a lake—

Mr. Charles: Does it say that?

Mr. Miller: Does it say what?

Mr. Charles: Does it say it was a lake?

Mr. Miller: Do you want to read it?

Mr. Charles: I am reading it with you and I cannot see l-a-k-e.

Mr. Miller: "Was there a l-a-k-e created?"

"Answer: Yes, there was water."

The Court: It is 1 o'clock, gentlemen.

Mr. Charles: It was not in that sentence.

Mr. Miller: I am reading four lines, Mr. Charles.

The Court: We shall recess for lunch at this time, gentlemen. Be back at 2 o'clock.

(A luncheon recess was taken.)

[fol. 84]

AFTERNOON SESSION

FREDERICK C. OTT resumed the stand and testified further as follows:

The Clerk: You are still under oath.

Mr. Miller: Just for the record, I will withdraw the last question on the record before the colloquy between counsel.

Cross examination.

By Mr. Miller (continued):

Q. Mr. Ott, if you would, please, assume that in 1927 at the subject property which you have surveyed there was an excavation of some 400 feet in width by 30 feet deep, and the 30 feet deep means below water; that there was a lake created of 30 feet in depth; I ask you, sir, based upon your experience as a licensed surveyor and based upon your knowledge of the subject property, under such assumption would the excavation have been more than 10 feet below the established grade of the nearest abutting street? Do you follow me, sir? An excavation, 30 feet of water at that subject property, would that be more than 10 feet below established grade?

A. It is most difficult to base an answer upon the assumptions you have given me.

Q. Is it not correct, sir, that you have plotted on Plaintiff's Exhibit 3 in evidence the grade? Do you show the grade on that topographical survey?

A. Of the adjacent streets, yes.

Q. Let us take Newbridge Avenue, the main entrance to the pit. What is the established grade of Newbridge Avenue?

A. It is shown on the survey there.

[fol. 85] Q. Would you point that out to his Honor, please, and tell me what the figure is?

A. Yes. At the southerly end of the pit on Newbridge Avenue, 57.6.

Q. Opposite the gate, the entrance by the office?

A. Opposite the gate would be approximately 60 feet elevation.

Q. I see a figure of 59.7, is that not correct?

A. Yes.

Q. Now I ask you, sir, if in the excavation itself there had been created a lake 30 feet in depth in 1927, would that not have been in excess of 10 feet below the established grade of Newbridge Avenue, sir?

A. At that point?

Q. Yes.

A. At the gate?

Q. As a point of reference, let us take the 59.7 elevation opposite the gate, and if you walked into the gate in 1927, to make a survey, and you saw an excavation with a lake which was 30 feet deep, the water 30 feet deep, I ask you, assuming this hypothesis, if you had gone in under those circumstances, would the depth of the pit, the 30 foot deep lake, have been more than 10 feet below the established grade of 59.7 on Newbridge Avenue.

A. I will answer that yes, 30 foot deep.

Q. Sir, would it not be correct that under the same assumption the excavation would have been below 2 feet above maximum ground water level at that site?

Mr. Charles: I object to this on the ground that it is immaterial to the present lawsuit.

Mr. Miller: If I may be heard, Judge, I think it is highly material in view of the defenses pleaded.

[fol. 86] The Court: Is that your only ground, immateriality?

Mr. Charles: Irrelevant and incompetent.

The Court: Why is it incompetent?

Mr. Charles: It is incompetent because we are suing under a statute which was passed in 1945 originally, and that is the basis of our lawsuit, and that conditions that existed in 1927 could only go to use. In other words, the defense of res judicata is based on an action brought under a zoning statute. The action that is now being brought is brought under a regulatory statute from which flows the police power of the Town, and therefore what the conditions were in 1927 are immaterial and irrelevant and certainly incompetent under those conditions.

Mr. Miller: If I may be heard, Judge—

The Court: You may.

Mr. Miller: I believe under the defenses we are pleading we have not only pleaded res judicata under the zoning ordinance, which is the building zone ordinance of 1930—which has already been adjudicated before Judge Hill—but we are also claiming here that we have a valid, vested nonconforming use with respect to the provisions of the 1945 ordinance under which this complaint is based.

In other words, this is highly material at this point for this reason: If in 1927 we were 30 feet deep, which the minutes indicate in the previous trial, if that is more than 10 feet below grade and if that is below 2 feet above max- [fol. 87] imum ground water level, as those two phrases are used in the 1945 ordinance, then when they passed an ordinance in 1945 with regulatory provisions, we merely did not conform to that ordinance, and that ordinance cannot be asserted against us in this case. We have a valid nonconforming use as against the later adopted ordinance.

The Court: I sustain the objection, first upon the grounds given by Mr. Charles, secondly that it is not proper cross-examination, and thirdly, no proper foundation has been laid for the question.

Mr. Miller: I respectfully except.

Q. Mr. Ott, when you surveyed this property in 1959, at what elevation would you say there was maximum ground water level at this site?

A. At elevation 50.2.

Q. What would the elevation be in that excavation at a depth of 30 feet of water?

A. 20.2.

Q. At an elevation of 20.2, sir, is it not a fact that you would be below 2 feet above maximum ground water level? 2 feet above maximum ground water level would be what, 2 on top of 50.2?

A. Yes.

Q. So, 52.2 would be 2 feet above maximum ground water level?

A. Yes.

Q. And you say that with a 30 foot deep lake you would have an elevation of 20.2?

A. That is right.

Q. Mr. Ott, is it not a fact that your firm has been employed by the municipal unit, either Town of Hempstead or County of Nassau, having jurisdiction over Newbridge [fol. 88] Avenue with respect to plans to widen Newbridge Avenue adjacent to this sand pit?

Mr. Charles: I object to that on the ground it is improper cross-examination.

The Court: Is this addressed to his credibility as a witness?

Mr. Miller: No, it is addressed to several grounds: One, credibility; two, Judge, on the question of the plans for the improvement of Newbridge Avenue and what they expect to do with the storm water which they will have to drain off of it in order to improve it. We are going to show by maps that they already have plans to drain into our sand pit, and that is part of our defense in this case.

The Court: Then do it at the time of your defense. Objection sustained. You see, Mr. Miller, I have to keep my eye on the issues in this case.

Mr. Miller: Then I will recall Mr. Ott as my own witness.

Q. Mr. Ott, this morning you mentioned that you had roughed out or roughed an estimate—pardon me if I do not have the exact word—of the amount of cubic yards that had already been removed from there. You said you could not determine it precisely because you did not know, obviously, what the terrain was when the excavation commenced. Do you recall that answer, that you had made a rough calculation or rough estimate?

A. I do.

Q. Could you tell me, sir—I neglected to ask you at that time—what was your rough calculation or estimate as to [fol. 89] the number of cubic yards which have been already removed, subject, as you mentioned on your own testimony, to not knowing the exact terrain?

A. I said well over a million yards.

Mr. Miller: I have no further questions of this witness, with the understanding he will remain subject to subpoena, which has been agreed upon.

The Court: Is that agreeable?

Mr. Miller: He has been subpoenaed as a defense witness. He was also called as a witness for the plaintiff. I will defer any further questions until such time as I call him as my own witness on the defense.

Mr. Charles: We will hold him available.

No redirect.

(The witness was excused.)

Mr. Charles: With that, your Honor, the plaintiff rests.

The Court: Plaintiff rests.

Mr. Miller: If your Honor please, at this time the defendant moves to dismiss the first and second causes of action of the complaint on the ground that the plaintiff has failed to make out a prima facie case under the terms of the ordinance—if I may, Judge—will you strike that out?—the defendant at this time will reserve all motions until the end of the case.

The Court: Are you ready now to present your defense?

Mr. Miller: I am ready. I will call Mr. Ott as my first witness.

[fol. 90] Frederick C. Ott, recalled as a witness by the defendants, resumed the stand and testified further as follows:

The Clerk: You are still under oath.

Direct examination.

By Mr. Miller:

Q. Mr. Ott, you are employed by Lockwood, Kessler & Bartlett, are you not?

A. I am.

Q. Is it a fact, sir, that Lockwood, Kessler & Bartlett has been retained in connection with the plans to improve Newbridge Avenue at or near and adjacent to the sand pit which is the subject matter of this proceeding?

Mr. Charles: Prior to making my objections, your Honor, I would like to know now specifically under which defense the defendant is offering proof.

Mr. Miller: The present questions, if your Honor please, are primarily in connection with the third separate defense pleaded in the answer.

The Court: Which briefly is what?

Mr. Miller: Which briefly is that the plaintiff for many years has indicated a need to acquire the real property in this complaint for drainage, and my questions of

this witness are with respect to drainage of Newbridge Avenue which is adjacent to the sand pit.

Mr. Charles: My answer to that is, your Honor, that the evidence sought to be obtained from this witness is irrelevant, it is immaterial, and it is incompetent, because [fol. 91] motive is no part of this lawsuit and the courts have so held.

The Court: I have your brief here.

(Discussion off the record.)

The Court: Your contentions are solely that the cause of action is one in violation of the Town ordinance, is that correct?

Mr. Charles: That is correct, sir.

The Court: Objection sustained.

Mr. Miller: If your Honor please, at this point I must confess for the record that I have not been extended the courtesy of being served a copy of that memorandum to which you made reference and therefore I am not in any position to argue on the point of evidence.

The Court: Are you in a position to sustain your affirmative defense?

Mr. Miller: I am in a position to sustain my affirmative defense, if your Honor will take the proof which I am going to adduce.

The Court: What law have you to sustain you on your affirmative defense?

Mr. Miller: There is a general proposition in equity that a plaintiff in an equitable action must appear with clean hands. Motive is an essential element of the doctrine of clean hands. If this action is not brought in good faith, if the actual intention of the plaintiff in this action is an attempt to harass and annoy the defendants with a view in mind of knocking down the price which might have to be paid in a condemnation proceeding which is now imminent, then and in that event the courts—if upon all the evidence [fol. 92] adduced it is believed that the proper motive is indirect that there is not an actual bona fide enforcement of the ordinance—the courts may sustain the defenses and find affirmatively for the defendant in such a case. If it is

proven upon the trial, on the other hand—and I must concede this—that they in good faith have always enforced their ordinances, and meticulously come in and enforced their ordinance in this case, if we are in violation and do not have a saving by virtue of a nonconforming use, then and in that event we would be guilty or in violation of the terms of the ordinance. But until the proof is brought in before your Honor, I frankly must confess that I do not see how your Honor can rule on the question of the good faith of the Town in bringing this action.

The Court: You have no law to sustain your position.

Mr. Miller: As I told your Honor, I was directed to appear for trial within a two-week period of time, roughly speaking, and I could not do it.

The Court: That is not exactly true, sir.

Mr. Miller: I believe it was the closing days of May when we were in chambers with your Honor, and the trial was set for June 15.

The Court: But before that you were before Mr. Justice Munder and he directed an early trial, and all you came before me on was the question as to whether the case should be tried June 1, as Mr. Justice Munder directed you, or [fol. 93] tried in the latter part of June. At that time I told you that it could not be started on June 22 or 23 because that would be the last week of the June term. I therefore directed both of you to speed up your examination before trial and to be ready for trial on the 15th.

During the time this case came on, during the period between which the case came on before Mr. Justice Munder and the case came up for trial, which was the 16th of June, yesterday, a whole month elapsed, and during that time you had sufficient time to find law to sustain your position in this case.

Mr. Miller: Judge, in that period of time I conducted eleven separate examinations before trial in this case and there was other preparation, maps and photographs and many other things which had to be done.

The Court: Counselor, the most fundamental thing in the preparation of a case, in my opinion, is finding out what the law is going to be to sustain your position first, and then you build up the facts.

Mr. Miller: Judge, I agree with you that the law is highly material, but I respectfully submit that the best memorandum of law with no evidence to put in as your direct case or as your direct defense will not serve to aid you.

Your Honor has sustained the objection?

The Court: I have sustained the objection.

Mr. Miller: I respectfully except.

[fol. 94] The Court: Of course.

Q. Mr. Ott, I believe you testified you were a licensed surveyor, are you not?

A. I am.

Q. Would I be correct in assuming that you can read a map, sir?

A. I can.

Mr. Miller: I ask that this document be marked as Defendant's Exhibit C for identification.

(Marked Defendants' Exhibit C for Identification.)

Q. Mr. Ott, I show you Defendants' Exhibit C for Identification and I ask you, sir, if you know what this document is.

COLLOQUY

Mr. Charles: I object to that, your Honor, upon the grounds that if it is being offered as part of the third separate defense, then it is incompetent, irrelevant and immaterial.

The Court: He has not said for what defense he is offering it yet.

Mr. Charles: Will you tell us as to what defense you are offering it?

Mr. Miller: Judge, I do not see how it is (sic)

(sic) Mr. Miller: Judge, in that period of time every single exhibit with every defense, I had better keep the pleadings with me.

The Court: That will not be necessary, but I have not the slightest idea what this map is all about, you see. It may not be on the affirmative defenses, for all I know.

Mr. Charles: I do not know.

The Court: It may be part of his answer to you without being an affirmative defense.

[fol. 95] Mr. Charles: That is right.

Mr. Miller: Judge, it is difficult to pick out as to what portion of the defense a specific exhibit—

The Court: What is the map?

Mr. Miller: The map is a comprehensive master plan of drainage for the upper Newbridge Avenue which includes the subject property.

The Court: And once the map gets into evidence, then what is the relevancy and materiality of the map to me who have to decide the case?

Mr. Miller: The map shows, your Honor, the points at which they plan to drain the adjacent streets and area into our pit, and if that is not material, I confess I do not know what is.

The Court: Is it in answer to their affirmative case?

Mr. Miller: It is on everything, it is affirmative defenses and the general denials. It is the question of good faith, it is the question of drainage, it is the question of acquisition, it is the question of denials to the complaint.

The Court: They claim in the first cause of action—by "they" I mean the Town of Hempstead—that you have not complied with Ordinance No. 16, is that correct? Is that the gist of action number one?

Mr. Miller: Yes.

The Cou. : The first cause of action is that you have not complied with Ordinance No. 16, in that the defendant [fol. 96] failed to obtain a permit or procure a permit. That is the gist of cause number one?

Mr. Miller: Yes, sir.

The Court: The gist of cause number two is that the property itself is actually in violation of Ordinance No. 16. Is that the gist of action number two?

Mr. Charles: Yes, your Honor.

The Court: How is this map relevant on cause number one and cause number two?

Mr. Miller: It is not relevant to cause number one of the complaint.

The Court: It is not relevant to cause number one.

Mr. Miller: It is not relevant on the question of a permit.

The Court: How is it relevant on cause number two?

Mr. Miller: With respect to the second cause of action in the complaint, if your Honor please, the complaint specifies various points of reference in this subject property from the property lines and from the established grade of the nearest public street. The nearest public street is depicted upon this map. Also, there is a condition alleged of failure to refill the pit excavation where earth has already been removed to the maximum extent allowed under the ordinance with the conclusion that there is no adequate remedy at law. Actually, plaintiff has an adequate remedy to not only remedy the alleged violations here, which we submit are not violations, but the remedy to cure the entire situation by condemnation and acquisi-[fol. 97] tion of this property, for which they have already drawn up maps—

The Court: Suppose I do this. Suppose I take it and you gentlemen can argue in your briefs its relevancy.

Mr. Miller: With respect to the defenses pleaded in the answer—

Mr. Charles: Then I have a general exception to any evidence that is being offered to sustain the third separate defense.

The Court: No, I will not give you a general exception, Mr. Charles. What I want you to do, each time you make your objection and then I shall rule. If I rule in such a way as to make it allowable, I will say so; at other times I may rule and say I will take it and ask you to brief the question.

Mr. Charles: Very well, sir.

The Court: That is what I am doing now. In respect to this map, I am taking it and then you brief the question later on as to whether it is admissible or not. Because at this point I am being asked to become an expert in this field, you might say, on a few moments' notice.

Mr. Miller: May I just state, if your Honor pleases, that aside from the arguments I advanced with respect to the complaint, the defense deems it highly material with respect to the defenses pleaded, particularly the third separate defense, as to the relevancy and admissibility of

this map. The third defense is that they have indicated a need for and a desire to acquire the real property in [fol. 98] order to correct drainage conditions. This map actually shows the points at which they will drain into this sand pit.

The Court: On the third defense I am going to rule right now that you are not going to show motive.

Mr. Miller: Without going into the definition of the word "motive," if your Honor please, I think a course of conduct actually entered into by the plaintiff in this action is highly material to this case. Motive presupposes a mental attitude along with conduct. I would respectfully submit that the course of conduct would definitely be admissible, as to what they have affirmatively done, not, what I am trying to say, what they are thinking of doing. Motive may imply a mental attitude as well as a physical act, but certainly the physical acts which they have done and the maps which they have already drawn would be admissible with respect to an alleged defense.

The Court: Is this on number three, the third affirmative defense?

Mr. Miller: It is directly material with respect to number three.

The Court: If it is on number three, it is excluded.

Mr. Miller: I respectfully except to your Honor's ruling. Does your Honor likewise rule the same way with respect to the second separate defense pleaded in the answer, in that the application of what the plaintiff has done in the preparation of these instruments and the course of conduct would operate to deprive the defendant of the lawful [fol. 99] use of his property without due process of law?

The Court: What is your second defense?

Mr. Miller: That the ordinance is unconstitutional, illegal, invalid, discriminatory, confiscatory and void, inasmuch as same is deemed to affect the premises of defendant Goldblatt, in that this court has previously adjudicated a nonconforming use of the premises for the business conducted. Said ordinance further is void on the ground it constitutes ex post facto legislation and contravenes the provisions of the United States Constitution and the Con-

stitution of the State of New York—and here is the material reference with respect to this course of conduct—that said ordinance further is void on the ground that its application would deprive the defendant Goldblatt of the lawful use of his property without due process of law; and further that application thereof to the said premises so permanently restricts the beneficial use thereof as to amount to confiscation of property rights without just compensation, which would come well within the purview of the Fifth and Fourteenth Amendments of the Constitution.

The Court: Is that the only law you have to sustain your point, the due-process clause of the Fifth Amendment?

Mr. Miller: Arverne Bay Construction Company against —I am picking it out from memory—

The Court: 278 New York.

[fol. 100] Mr. Miller: 278 New York. Pennsylvania Coal Company v. Mahon, U. S. Supreme Court.

The Court: Those are just general cases, are they not?

Mr. Miller: With respect to this point, if your Honor please, the constitutional point.

This is a map prepared by an employee of the plaintiff Town of Hempstead.

The Court: We will take the map in evidence.

Mr. Charles: Exception.

The Court: On the condition that I told you. You can argue the relevancy later on. I do not want to foreclose counsel from proving these vague defenses. If it is immaterial, you can argue in your brief and I will not consider it then. Why argue the point now?

Mr. Charles: All right.

The Court: There is no jury here, I am not going to decide it now, you will brief the point.

(Received in evidence as Defendants' Exhibit C.)

The Court: Are you going to offer any proof to counteract the affirmative case made by the plaintiff on counts one and two?

Mr. Miller: I am going to offer direct testimony as to the fact that they are nonconforming.

The Court: Would you not be better off—you are the attorney now—if you offered evidence to counteract their [fol. 101] causes of action one and two before you worried about these affirmative defenses?

Mr. Miller: The only thing I was going into with Mr. Ott, off the record, was to save him some time so he would not have to return.

The Court: Never mind saving him some time. You try to help the Court to understand this case.

Mr. Miller: Yes, I could go into direct question of non-conforming.

The Court: Why don't you do that?

Mr. Miller: I will be glad to if your Honor would prefer it that way.

The Court: In your good. It is better if you defend on the issues they have raised than to worry about these affirmative defenses at this particular point.

Mr. Miller: Surely. If your Honor please, in view of our discussion, at this point then I would ask leave of the Court to excuse this witness and I would call another witness to the stand and proceed with another line of examination, subject to his recall.

The Court: All right. Mr. Ott may object to a certain extent, but in the interests of justice he will come back if necessary.

(The witness was excused.)

[fol. 102] HERBERT W. GOLDBLATT, residing at 127 Stevens Avenue, Hempstead, New York, called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Goldblatt, what is your occupation?

A. I am in the sand and gravel business.

Q. How long have you been engaged in the sand and gravel business?

A. Personally, I would say about twenty years.

Q. Would you tell his Honor briefly what do you mean by the sand and gravel business?

A. Mining sand and gravel at the sand pit in East Meadow.

Q. Aside from the mining of the raw aggregates out of the earth, are there any other procedures that you do at your pit?

A. We wash it and screen it and process it into different grades of material, and naturally we sell it.

Q. In point of time, how far back do you have personal knowledge of this property?

A. I can remember back to when I was a child, I mean visiting the property with my parents.

Q. Do you have any independent personal recollection of this property at the time it was first developed as a sand pit?

A. Yes, I do.

Q. When was that?

A. That was in 1927.

Q. Had you ever seen the property before the sand and gravel business started?

A. No, my earliest recollection was about the time when it first started, it was just beginning at that time.

Q. At that time in the beginning it was originally flat land?

A. Yes, substantially.

Q. Then an excavation was commenced, is that correct?

A. That's right.

[fol. 103] Q. By what means was that excavation?

A. It was originally started with a drag line, and when they got down to water they built a dredge, and from that point on it was a dredging operation. That was over a period of about a year, I would say.

Q. When would you say the first dredging operation commenced in point of time?

A. Somewheres around 1928.

The Court: 1928?

The Witness: '28 or '29.

Q. Was there water on the property before the dredge was actually put in?

A. Well, they had to have water in order to float a dredge, yes. There was water put forth.

Q. You have been personally engaged in this business for some twenty years?

A. Directly, yes.

Q. Twenty years ago would be 1939, is that correct?

A. Right.

Q. In 1939, sir, do you have personal recollection of the size of the excavation?

A. At that time the lake was rather large already, yes, quite large.

Q. Prior to 1945, at your sand pit in East Meadow, did you have any excavations commencing within 20 feet from the property line?

A. Yes.

Q. Do you know approximately how many points prior to 1945 you may have been less than 20 feet from the line?

A. I would say there were at least half a dozen places like that.

Q. The perimeter of the pit is not static, it is not constant, is that correct?

[fol. 104] Mr. Charles: If your Honor pleases, I object to this line of testimony on the ground that it is irrelevant to the present condition that has been testified to by Mr. Ott, and I do not see the purpose of the proof.

The Court: I will allow it.

Mr. Charles: Exception.

(The last question was read.)

A. It depends on the location. If it is an area which you are mining in, it would not remain static. If it was an area which you were no longer mining in, it would naturally remain static.

Q. Prior to 1945, particularly December 18, 1945, was the incline of the side walls of the pit greater than 2 horizontal feet to 1 vertical foot?

A. That is definite.

Mr. Charles: I have the same objection.

The Court: Same ruling.

Mr. Charles: Exception.

Q. What was your answer, sir?

A. Definitely.

Q. Do you know in how many places the angle was greater than 2 on 1?

A. I would say at practically all points where the ground had been excavated.

Q. Do you know, sir, of your own knowledge what the approximate angle of the side walls was prior to 1945?

A. Approximately 45, perhaps slightly gentler than that.

Q. Would you tell the Court, please, a 2 on 1 or 2 horizontal on 1 vertical is what angle?

A. That would represent a declining angle of 30 degrees.

[fol. 105] Q. You said you had about a 45 degree angle prior to 1945, is that correct?

A. That is right, and that would be equivalent to a 1 foot on 1 foot.

Q. 1 on 1 is 45 degrees, 2 on 1 is 30 degrees?

A. That is right.

Mr. Miller: If your Honor please, pursuant to stipulation with Mr. Charles, we will add to the notice to admit an ordinance requiring the safeguarding of open sand banks, pits and quarries, dated October 30, 1934.

Mr. Charles: That is all right.

Mr. Miller: That is the notice to admit, it is part of the record.

Q. Mr. Goldblatt, with respect to your property and the perimeter lines, is your property fully enclosed with a fence?

A. It is.

Q. What type of fence is that, sir?

A. It is a six-foot high chain-link fence with three strands of barbed wire on top.

Q. Does that fully enclose your property except for gates for access and egress?

A. That is right.

Q. Do you know, sir, of your own knowledge, when that fence was erected?

A. About 1949.

Q. Prior to 1949 were the premises open or was another fence up there?

A. No, it was enclosed with what is known as farm fencing which is a square pattern of wire with a mesh, I would say, of approximately six inches.

Q. When the chain-link fence was erected in 1949, to your knowledge was the construction of that fence inspected by the Building Department of the Town of Hempstead?

[fol. 106] Mr. Charles: I object to that on the ground it is incompetent on this trial.

The Court: What year was this?

Mr. Miller: 1949.

The Court: I will allow it.

Mr. Charles: Exception.

A. Yes, it was inspected by Mr. Young of the Building Department.

Q. You personally saw him on the premises?

A. Oh, yes.

Mr. Miller: At this point, if your Honor please, I ask the Court to take judicial notice of the provisions of the ordinance of 1934 which we have just added to the notice to admit, which said ordinance requires a fence six foot in height of steel wire mesh, without any requirement for a concrete curb. This is all addressed to the—

The Court: That is in 1934?

Mr. Miller: 1934. My argument now is addressed only to the concrete curb under the fence which is a portion of the complaint.

The Court: I am permitted to take judicial notice of any ordinance, past and present, I presume, under 344a of the Civil Practice Act.

Mr. Miller: I am asking these questions, if your Honor please, because I am about to make a motion to dismiss that one portion of the complaint.

The Court: I am taking judicial notice of the 1934 ordinance.

[fol. 107] Mr. Miller: Right. I further ask your Honor to take judicial notice of the ordinance of December 18, 1945, which is the ordinance on which this complaint is based as amended, and the original ordinance in 1945 contained no

provision for a concrete curb under the fence. The ordinance of November 25, 1958—1958—adds a requirement of a concrete fence and you have testimony before your Honor that this fence was erected in 1949, nine years before they adopted a provision that a curb must exist under the fence. I therefore at this time move to dismiss that portion of the second cause of action with respect to the failure to have a concrete curb underneath the fence.

The Court: I will reserve my decision on your motion.

Mr. Miller: Thank you.

The Court: I would like to point out, the mere fact that I take judicial notice of the ordinance at this moment does not mean it is in my human head here. One of these days I will have to read that ordinance to which you have reference.

Mr. Miller: I presume that your Honor will read the ordinances.

The Court: I am giving you the reason why I am not ruling right now.

Mr. Miller: I see what you mean, of course.

The Court: I would like a little bit more orderly procedure in this trial.

Mr. Miller: What is that, sir?

[fol. 108] The Court: I would like a little bit more orderly procedure in this trial, in other words, more orderly steps.

Mr. Miller: I am following the complaint verbatim, if your Honor please, which I thought was what your Honor had in mind.

The Court: Go ahead, develop your evidence.

Q. Mr. Goldblatt, in the course of your business do you inspect the fence which surrounds the perimeter of your property?

A. Yes, we do.

Q. How often do you make inspections?

A. About twice a week.

Q. When was the last time you made an inspection of your fence?

A. There was an inspection made toward the early part of last week.

Q. Did you personally make that inspection?

A. Yes, I did.

Q. Did you find any openings in the fence except for the gates necessary for access and egress?

A. No other openings.

Q. Do you supervise or personally make inspections periodically to see that there are no openings except for access and egress?

A. I supervise them and sometimes I make the inspection myself, yes.

Q. Mr. Goldblatt, do you know what the maximum ground water level is at the site of your pit?

A. You want it in an elevation referring to Nassau County datum?

Q. Yes, if you know.

A. At present it is approximately elevation 50.

Q. You heard the testimony of the plaintiff's witnesses here, did you not, that your excavation is below 2 feet above maximum ground water level? Did you not?

A. Yes.

[fol. 109] Q. I would ask you, sir, when in point of time, to your knowledge, there first existed an excavation less than 2 feet above maximum ground water level?

Mr. Charles: I object on the ground it is immaterial to the present action.

The Court: I will allow it.

Mr. Charles: Exception.

A. My answer to that is prior to 1930.

Q. Do you know the grade of Newbridge Avenue adjacent to your sand pit?

A. I would have to refer to a map.

Q. Adjacent to you, Mr. Goldblatt, is Plaintiff's Exhibit 3 in evidence, which is a topographical survey of your pit. By examination of that exhibit are you able to tell the Court what the elevation is of Newbridge Avenue adjacent to your pit?

A. Yes.

Q. What is that, sir?

A. Opposite the main gate, 59.7.

Q. Is your excavation more than 10 feet below the established grade of Newbridge Avenue?

A. It is.

Q. When in point of time, for the first time, was your excavation more than 10 feet below the established grade of the nearest public street?

A. Prior to 1930.

Q. Are you today presently actively mining sand and gravel at the premises?

A. Yes, sir.

Q. Have you exhausted that pit in any portions?

Mr. Charles: I object to that.

The Court: Which part are you objecting to?

[fol. 110] Mr. Charles: That is immaterial and irrelevant.

The Court: Which part are you objecting to? The whole question?

Mr. Charles: The "exhausted" part of it.

The Court: Objection overruled.

Mr. Charles: Exception.

A. No, we have not exhausted the available deposits.

Q. Are there any portions or parts of your pit where the earth has already been removed to the maximum extent allowed under the ordinance, the ordinance being Ordinance No. 16?

A. No, there are no such portions.

Q. Mr. Goldblatt, are there any portions of the perimeter of your property which permit public access to the pits and slopes?

A. No.

Q. Based upon your personal inspections of your fence, Mr. Goldblatt, are there any openings, gaps, or holes in your fence?

A. No, sir.

Mr. Miller: If your Honor please, in order to keep a continuity of the questions, at this point if I were to continue with this witness I would go into the questions of the affirmative defenses. I have no further questions with respect to the complaint itself, and if it is all right with your Honor, I would allow cross-examination at this point subject to my continuing later with the defenses.

The Court: You finish with this witness now.

Q. Mr. Goldblatt, would you please direct your attention back to the year 1953, and I ask you, sir, if in 1953 you [fol. 111] had any conferences with officials of the plaintiff in this action?

A. I did.

Q. Will you tell the Court how many conferences were held between you and the officials of the Town of Hempstead?

COLLOQUY

Mr. Charles: I object again, your Honor, to this on the grounds it is immaterial, incompetent, goes to motive.

The Court: I am going to sustain the objection, because I want you to know, Mr. Miller, that in a case of Linn vs. Town of Hempstead, tried in October of 1957, I ruled at that time that the motives of legislators cannot be inquired into in the trial of an action where the motives which may or may not be behind legislation are involved.

Mr. Miller: If your Honor pleases, from what your Honor has just said of the Linn case, there is nothing in the testimony which I seek to adduce here which affects legislation in any way. These men did not sit as a legislative body. These are conferences with the officials, with the presiding Supervisor of the Township, with respect to a drainage condition adjacent to our property. These are conferences concerning the possibility of buying or condemning real property. It has absolutely nothing to do with legislation at all.

The Court: If you are offering evidence on cause of action number three, I am excluding that line of testimony, because all I can see in your cause of action number three at the most is an allegation with respect to motives of the town [fol. 112] officials. Is that correct?

Mr. Miller: Aside from motive, as I said before, Judge, there is a course of conduct here.

The Court: How is a course of conduct of any legal consequence in this case?

Mr. Miller: It is of a direct legal consequence because it goes to the good faith of the plaintiff in the bringing of this proceeding, which we maintain, respectfully, is an equitable defense.

The Court: If it has to do with your affirmative defense number three, your evidence is excluded.

Mr. Miller: If I understand your Honor's statement, or may I understand it, is that tantamount to a dismissal of the third separate defense completely?

The Court: Do you want to consider it that? I would say yes.

Mr. Miller: I would like to know, sir.

The Court: I will dismiss it right now.

Mr. Miller: Do I take it, then, sir that I am now precluded from offering any evidence with respect to the course of conduct of the plaintiff, its officials, their desire to acquire the real property, the conferences that have been held in the installation of drainage in the area?

The Court: Yes, I am so ruling.

Mr. Miller: Is that under the authority of Linn vs. Town of Hempstead?

The Court: I did not say that. All I said was that under the Linn vs. Town of Hempstead case. I ruled that the court [fol. 113] could not permit inquiry into motivation which went into the creation of an ordinance. That case was a zoning ordinance that was involved, and I did not permit inquiry into the motivating factors of the town officials of the Town Board which went into the creation of this zoning ordinance, and I so ruled. We cannot inquire into the motives of the town officials in respect to what went into the ordinance. I also say to you that if the ordinance is valid, what impelled the town officials to act in this case is not in issue.

Mr. Miller: I must respectfully except to your Honor's ruling.

The Court: You have the right.

Mr. Miller: And I would most respectfully reiterate, Judge, that there is absolutely no connection here with legislation or impending legislation or the enactment of an ordinance by these town officials with respect to the evidence to be adduced by the defendants in this case.

The Court: I say this to you, Mr. Miller: If this ordinance is legal and constitutional, the ordinance itself, no matter what the town officials may have done in the past, no matter what their motivation may have been in the past,

if that ordinance is on the books, they have an obligation and a duty to enforce it.

Mr. Miller: But if your Honor please, if the town officials failed to enforce it, this ordinance which is on the books, as against everybody in the world except one person, and if following conferences with this one particular person they [fol. 114] made certain demands, I think it is highly material in an equitable cause of action where they seek equity that they must do equity, and they must come in with clean hands.

The Court: Mr. Miller, the doctrine of clean hands may be a very old doctrine in the field of equity which goes back to what we sometimes say is time immemorial—

Mr. Miller: I would say to Lord Coke, at least.

The Court: However, no action by a public official, present or past, can waive his obligation to enforce a statute or ordinance on the books.

Mr. Miller: I do not dispute that point with your Honor. The point of dispute between your Honor and myself, I respectfully submit, is the question of adducing evidence concerning conversations between officials of the plaintiff in this action and the defendant in this action, which I respectfully submit—

The Court: Assuming everything you say to be true, assuming arguendo, as some judges would say, and I seldom do, that everything you say is so, that their motives may have been not the best, assume that they may have done everything which you say in your affirmative defense number three, that still does not change their legal obligation to enforce the ordinance which is now on the books if that ordinance is legal and constitutional.

Mr. Miller: And if it may be applied to the defendants.

[fol. 115] The Court: If the ordinance is legal and valid and constitutional, they are obligated to enforce it.

Mr. Miller: If your Honor please, I respectfully submit that aside from the third separate defense on the question of motive or course of conduct, whichever way it is termed, we still have a defense here that we are nonconforming with respect to the provisions of this Ordinance No. 16.

The Court: I will say this again to you too: Even a course of conduct on the part of town officials does not wipe

out the obligation to enforce a legal, valid, constitutional ordinance. Actions by town officials cannot waive their obligations. What they may do as individuals, even as town officials, cannot waive their legal obligation to enforce an ordinance.

Mr. Miller: I agree with your Honor that a person charged with enforcement of a legal, subsisting, valid law has an absolute duty to pursue the enforcement of that law. There is absolutely no question in my mind about that. I respectfully submit to the Court that in connection with all of the defenses pleaded in the answer, even though a course of conduct or motive may not be an absolute defense against an enforcement of a provision of the ordinance, the course of conduct or motive, whichever way it is termed, is surely a matter to be considered in general equity jurisdiction, and that where we have had direct conferences between officials in their official capacity and the defendants personally, such [fol. 116] is highly material and is legally admissible in evidence to be decided by your Honor as to the weight of the questions. Naturally, if your Honor assumes at the end of the entire proof that we did not conform to the ordinance and we do not have a legal non-conforming use as respects this ordinance No. 16, then I quite agree with your Honor that you must come to the conclusion that the ordinance then is constitutional as to us, does not become confiscatory, must be enforced, and they are charged with the duty of enforcement. Of that there is no question or quarrel in my mind.

The Court: Now let us clear our lines again. The first cause of action states that you are operating this particular pit or area without having procured or obtained a license.

Mr. Miller: That is correct.

The Court: The second cause of action is that you are operating this area or sand pit in violation of the ordinance, and then it gives the reasons why there is a violation.

Mr. Miller: Yes.

The Court: Your answer denies the allegations of cause of action number one and cause of action number two. Your first affirmative defense is that this is res judicata. Your second affirmative defense is that this ordinance is unconstitutional.

Mr. Miller: As applied to our property, yes.

The Court: Your third affirmative defense is directed [fol. 117] towards the town officials' course of conduct, as you have called it, and the town officials' motives. Have I briefly stated your third affirmative defense?

Mr. Miller: Yes, sir.

The Court: Then I say to you, your third affirmative and separate defense is invalid.

Mr. Miller: I respectfully except.

The Court: I would like to have you direct your attention to your response to the plaintiff's first two causes of action and evidence as to res judicata and evidence as to the unconstitutionality of the ordinance herein.

Mr. Miller: If your Honor please, the questions which I have last asked the witness with respect to the point of time as contrasted with the date of the ordinance, as to that I respectfully submit you have testimony before you that prior to the adoption of this ordinance he had an excavation within 20 feet from the property line, which is the first complaint. The second complaint, he is more than 10 feet below established grade, he has testified that back before 1930 he was below established grade. This is a 1945 ordinance. The next complaint is that the side walls are more than 2 on 1. 2 on 1, according to the witness, is a 30 degree angle. He says that way back before the ordinance he was at 45 degrees, which is what the former ordinance was, it is in the notice to admit, the prior ordinance said 45 but they increased their requirements, just as a 6,000 square foot lot [fol. 118] suddenly becomes a 10,000 square foot lot under a zoning ordinance, and then you come in on variances and your Honor has seen many of those Article 78 proceedings, I am sure.

The Court: Too many.

Mr. Miller: The next complaint is that there is no concrete curb underneath the fence. This fence was erected in 1949, had been inspected by the Building Department of the Township and approved by them. The ordinance later was amended to adopt the requirement of a curb. We are simply nonconforming as to the necessity of a curb.

The Court: Mr. Miller, I am giving you a lot of latitude on first affirmative defense and second affirmative defense.

But if you direct your evidence to the third affirmative defense, then I will exclude it.

Mr. Miller: I did not hear you.

The Court: I am giving you latitude on the first affirmative defense and on the second affirmative defense, and any evidence you may offer to overcome their first and second cause of action. But if you offer evidence on the third affirmative defense, it is excluded.

Mr. Miller: All right.

The Court: Anything else you want to say, Mr. Charles, to protect the record?

Mr. Charles: May I say this, your Honor: The question of the zoning statute as compared to a regulatory statute is such that prior use does not give you vested rights under a regulatory statute. The best way I can picture it is if some [fol. 119] fellow prior to 1945 in a manufacturing district discovered how to make an atom bomb and the government said to him, "Wait a second, you have got to prescribe to certain regulations that we are going to set up," and he said, "No, I had a prior use, I can blow up the whole city," that is the distinction between the cases we are talking about right at the present time.

The Court: Your position, I think, is the same position that I took in a case that I decided in Queens recently involving a hospital. I had a case in Queens involving one of the hospitals whereby, by a city ordinance, the size of the hospital rooms were required to be larger than they were at the time the hospital was built, and I held in that case that the city ordinance was valid and constitutional even though it did deprive the proprietary hospital in that case of income and also of some use of its property. And just about the time that I rendered my decision in this hospital case in Queens, the Engelsher case was affirmed by the Appellate Division, exactly the same situation being involved.

I also find in the meantime that the Engelsher case has been affirmed by the Court of Appeals.

So far as regulatory ordinances are concerned—

Mr. Charles: May I say this: and certiorari was denied on June 8 by the Supreme Court.

The Court: What I would like to do in this case, this is just a thought, is to permit Mr. Miller, within reason-
[fol. 120] able limitations, of course, to put in what he thinks is his defense under affirmative defense one and under affirmative defense two, and then I will decide the case as I discussed with you previously on the basis of your briefs, and you can point out in your briefs then why this evidence may or may not be considered by the Court under some of the decisions which you have in mind which you are going to have in mind when you look up the law, Mr. Miller.

Are we clear now? So that if I should be liberal in my admission of evidence, you are permitted to brief that question and to show me in your brief why it should not be considered by the Court.

Mr. Charles: Very well, sir.

Mr. Miller: May I just state in response to one statement that Mr. Charles made on the question of regulation and regulatory ordinances that the Court of Appeals has already held—I think it is the Arverne Bay case—that when regulation goes too far it is tantamount to confiscation.

The Court: There is no question about that.

Mr. Miller: That is the only thing I wanted on the record.

The Court: It is the old battle between police powers and proprietary rights.

Mr. Miller: If your Honor please, in view of your Honor's ruling, I must respectfully ask for permission to adjourn until tomorrow morning, because I had planned on the introduction of evidence and questions on a completely different line, and frankly it would take me quite
[fol. 121] some time to go through various documents to set myself up for a completely different line of questioning, in view of your Honor's ruling. I do not want to vex the Court and counsel in any way to try and ask questions which will be contrary to your Honor's ruling on the third defense. Your Honor has made his ruling, I have my exception. I must now, if your Honor please, correlate more or less my entire file to stay away from that third defense, and in view of your Honor's ruling, I would re-

spectfully ask for permission to conclude for this afternoon so that I may give some serious consideration to the method of introduction of further testimony.

The Court: Mr. Miller, a courteous attorney such as you, who is merely trying to protect your client's rights to the best of your ability, never vexes the Court.

Mr. Miller: Thank you, sir.

The Court: So that you are accepting over objection, of course, and with exception, my ruling in respect to affirmative defense number three.

Mr. Miller: Yes.

The Court: You are protected on the record with respect to affirmative defense number three. You are going to confine the rest of your defense to answering cause of action number one and cause of action number two, and to developing your affirmative defense number one which has to do with res judicata and affirmative defense number two which has to do with unconstitutionality of the ordinances involved.

[fol. 122] Mr. Miller: That is correct, sir.

The Court: I think we can shorten the trial, therefore. Under the circumstances, you go back to your office now and prepare to give me a concise defense tomorrow.

Mr. Miller: Thank you, sir.

The Court: The case is adjourned until tomorrow morning at 10 a. m., unless I hear an objection.

Mr. Charles: Does that mean that Mr. Patterson, Mr. Larkin, Mr.—

Mr. Miller: There are eleven of them.

Mr. Charles: —are excused?

Mr. Miller: I cannot say that now, I do not know.

The Court: Suppose you do this—

Mr. Miller: I have to read over all the examinations before trial as compared with the pleadings and see what I am going to put in.

The Court: Suppose, in lieu of calling these public officials, you be prepared, if you want to, to offer excerpts from their examinations before trial and I will rule. I think you have everything you want in those E. B. T.'s have you not?

Mr. Charles: I would say so.

Mr. Miller: They are fairly complete but I am reminded of what your Honor said in chambers when I said we might shorten this into a very short trial by offering the E. B. T.'s and your Honor I thought expressed a desire to have direct testimony and not put the burden of reading the testimony on your Honor, the testimony of the E. B. T.'s. Maybe I misunderstood the Court.

[fol. 123] The Court: If you merely want to stand up there, Mr. Miller, and say, "I offer these examinations before trial into evidence," I would say no. But if you want to stand up there and read excerpts which I think might be pertinent to the issues—

Mr. Miller: Right.

The Court: Then you can start reading.

Mr. Miller: And your Honor will rule on each question?

The Court: Yes. Of course, you are also going to keep in mind that I have ruled out any evidence under affirmative defense number three; you will keep that in mind.

Mr. Miller: You have ruled out all evidence under defense number three, yes.

The Court: I have.

Mr. Miller: I respectfully except.

(An adjournment was taken until Thursday, June 18, 1959, at 10 a. m.)

Mineola, New York
June 18, 1959

(Appearances as heretofore noted.)

Herbert W. Goldblatt resumed the stand and testified further as follows:

Mr. Miller: If it please the Court, may I make a statement for the record following our discussion yesterday. I have since yesterday afternoon, if your Honor please, gone through my entire file in this case with a view in mind [fol. 124] of conforming with your Honor's directive that

I desist from offering proof with respect to the third separate defense, which was the equitable defense based upon unclean hands and the motive or course of conduct of the officials with respect to condemnation or acquisition of this property the subject matter of the lawsuit.

The Court: And you remember too, my ruling in that respect: that even assuming for the sake of argument you could prove that, my view was that they still had an obligation to enforce the law.

Mr. Miller: Yes, sir, and my statement for the record—I believe the record yesterday indicated I took due exception to your Honor's ruling.

The Court: Yes, you did.

Mr. Miller: My statement this morning, sir, is that I am going to attempt today to confine any proof to the first defense, which is with respect to the prior action before Mr. Justice Hill, wherein the nonconforming use was adjudicated, and secondly with respect to our defense on the grounds of constitutionality or the lack thereof as the ordinance is applied to the property in this case, basically the questions of discrimination, the confiscation of our property rights by the application of the ordinance, the basic constitutional questions which constitute our second defense and counterclaim wherein we seek an affirmative declaration of this court that the ordinance may not be enforced against us on constitutional grounds.

[fol. 125] The Court: When you say constitutional grounds, you mean the due process clause of the Constitution of New York State and the United States Constitution?

Mr. Miller: I am talking both, if your Honor please, of the Fifth and Fourteenth Amendments to the Federal Constitution, that is, Article I, Section 11, of the Constitution of the State of New York, and the Fourteenth Amendment of the Constitution of the United States.

The Court: The equal protection clause, too?

Mr. Miller: Yes. I believe the equal protection is the Fourteenth Amendment, is it not, sir?

The Court: I am sure of it.

Mr. Miller: That is why I mentioned the Fourteenth Amendment of the Federal Constitution. And we claim alleged discrimination with respect also to Article I, Section 11, of the State Constitution, the Constitution of the State of New York.

Mr. Charles, the original County Clerk's file is here in the action Town of Hempstead v. East Meadow Realty and Builders Sand and Gravel Corp., which was tried before Mr. Justice Hill, and I ask you, sir, if we may stipulate to offer into evidence in this trial the decision of Judge Hill dated March 9, 1956 from the original file, as well as the judgment signed by Judge Hill dated April 5, 1956 and entered April 9, 1956 in the office of the Clerk of Nassau County.

The Court: What was the date of the decision of Judge Hill?

[fol. 126] Mr. Miller: The decision of Judge Hill was March 9, 1956. The judgment was granted April 5, 1956, and the County Clerk's stamp for entry of judgment is April 9.

Mr. Charles: Why not offer, in addition to the judgment, the complaint and the answer and the judgment roll and the decision, and then the Court will have the complete file?

Mr. Miller: That is all right.

The Court: That is all on the issue of res judicata which was raised by your first affirmative defense.

Mr. Miller: That is correct, sir.

(Received in evidence and deemed marked Defendants' Exhibit D.)

Mr. Charles: This exhibit consists of the decision, opinion, pleadings, judgment.

At this time, your Honor, do you wish to have argument on the law as to the first?

The Court: No, you have laid your foundation in that respect. You will probably give me briefs, especially if I ask for them.

Mr. Miller. If your Honor will recall, I do not know whether it was in the courtroom or in chambers yesterday, there was colloquy between counsel and the Court with re-

spect to a motion to dismiss a complaint in a prior action between these parties, which motion was decided by Hon. Marcus Christ in this court, and counsel for the Town in this action made a statement to the Court basically to the effect that he believed that would foreclose us from again raising [fol. 127] the same question. I believe I stated to your Honor it was my impression that Judge Christ's decision clearly stated that under issues properly framed and upon a trial of a factual basis the defendants might assert and prove that the ordinance cannot be enforced against them.

In connection with that, sir, I would ask if Mr. Charles would accept this copy on the official memorandum paper of this court of the decision of Mr. Justice Christ which is dated November 30, 1956.

Mr. Charles: Have you the pleadings in that case, or are they before the court? Will you consider them as part of the exhibit, your Honor?

The Court: I shall.

(Received in evidence and marked Defendants' Exhibit E.)

Mr. Miller: If the Court please, the relevant portion of that decision to which I referred which I say does not foreclose us from raising it in this proceeding is the last sentence or the last two sentences of the three-page memorandum decision of Judge Christ.

Mr. Charles: Let the record further show that that action in which Mr. Justice Christ wrote that opinion was discontinued prior to the commencement of this action. In other words, we do not want the Court to be confused as to why there were two actions.

Mr. Miller: I would like the record to be complete on that point. The action was discontinued on request of the [fol. 128] Town Attorney to me after I served motion papers to dismiss, because they repealed their own ordinance and were out of court by their own affirmative act.

The Court: Why don't you gentlemen argue this in your briefs? Just give me the evidence in this case and anything else you want marked in evidence, and I will read your briefs in the quietude of my chambers.

Direct examination.

By Mr. Miller (continued):

Q. Mr. Goldblatt, I show you Defendants' Exhibits D-1, D-2, and D-3 for Identification, dated May 27, 1959, and I ask you, sir, if you have ever seen the properties depicted on those photographs.

A. Yes, I have.

Q. Are those photographs an accurate representation of the physical confines of the land as shown on those photographs?

A. Yes, they are.

OFFERS IN EVIDENCE

Mr. Miller: I offer them in evidence.

Mr. Charles: I object to them upon the grounds that they are immaterial and irrelevant.

The Court: What do they show, Mr. Goldblatt?

The Witness: They show Nassau County storm-water drainage basins in the Levittown area.

The Court: Is it near your property?

The Witness: Relatively near.

The Court: How near?

The Witness: Couple of miles.

Mr. Miller: Judge, this is in connection with the second defense.

[fol. 129] The Court: I will take it for what it is worth at the present time, and as I told you yesterday, argue in your briefs relevancy.

Mr. Charles: Exception.

The Court: For example, you look at that second affirmative defense and it is hard to say what is relevant and what is not relevant at this time. I do not want to foreclose counsel from offering evidence at this time which may pertain to the second affirmative defense.

Mr. Charles: All I want to do is protect my record.

The Court: I am sure you do, and I am helping you to.

(Received in evidence and marked Defendants' Exhibits F-1 through F-3.)

Q. Mr. Goldblatt, I show you Defendants' Exhibits F-1, -2, and -3, and I ask you, sir, would you tell the Court if you have ever personally been at that location.

A. Yes, I have.

Q. Did you make an examination of the earth directly underneath the fence?

A. I did.

Q. Would you tell the Court, please, and show him where you stood when you made this examination, by pointing to the pictures; tell the Court was there a concrete curb 18 inches in depth underneath that fence.

Mr. Charles: I object to the question on the ground it is immaterial.

The Court: What is the relevancy of that, Mr. Miller?

[fol. 130] Mr. Miller: One item of the complaint is that although we have a fence around our property, it is not set on a curb 18 inches in depth in accord with the ordinance. We claim discrimination in our second affirmative defense. We intend to prove to this Court that there exist in the Town of Hempstead numerous instances wherein no such curbs exist and that they are attempting to enforce this ordinance against us and against nobody else, and that is the heart of the constitutional basis of that defense, if your Honor please.

The Court: Unequal protection of the laws?

Mr. Miller: Yes, sir. Unjust discrimination, also. Judge, let me put it this way: If it is such a danger to life and limb and the police power has to be invoked to say you must have a curb, let them dig up all their own sumps and put these curbs under them.

The Court: I will take it and you have an objection, Mr. Charles.

Mr. Charles: And an exception.

The Court: And an exception.

Q. Mr. Goldblatt, continue and keep your voice up.

The Court: If you say something to me and Mr. Cohen does not take it down, it does not help you in the least.

A. On Exhibit F-3 I stood approximately in the same position as the photographer, and then, of course, I walked

[fol. 131] up close to the fence and I inspected it right here in the lower right-hand corner of the photograph, and there is no—

The Court: In other words, that is a true and correct representation of what you saw on the day you visited that area?

The Witness: That is right, and there is no concrete curb under that fence. The same applies to each of these three photographs. I looked at it over here on the left portion of Exhibit F-2 and there was no curb there. Similarly with F-1 towards the left-hand side of the corner, I inspected them through here and there was no curb.

Mr. Miller: If your Honor please, I have a series of twenty-one photographs which for the convenience of the Court the photographer has bound in a volume, I have given a set to my adversary, and I have a set for myself. I would like at this time to offer them as one exhibit. Mr. Charles has stated to me he would not object to the accuracy of the photographs. His only objection, I believe, was on a question of relevancy, and the same argument that I just made with respect to the second affirmative defense on the other photos would apply as to the introduction of these photos.

The photographs, as I have told Mr. Charles and shown him this morning, are photographs of another sand pit in the Town of Hempstead and other excavations and bodies of water in the Town of Hempstead.

The Court: Go ahead, Mr. Charles.

[fol. 132] Mr. Charles: I object to the photographs upon the ground that they are immaterial and irrelevant to the issues in this case.

The Court: I will take them again under those conditions I mentioned yesterday, and I repeated them this morning.

(Received in evidence and marked Defendants' Exhibit G.)

Q. Mr. Goldblatt, would you take this exhibit, please, and as you answer my questions, please, if you have to depict anything on the photographs, point it out to his Honor, and you can hold that exhibit up or place it in front of his Honor on the bench.

A. Yes, sir.

Q. Now, photograph No. 1 of Defendants' Exhibit G, Mr. Goldblatt—correct me if I am wrong as I go through these—is the photograph wherein you are standing in front of a sign on the roof which reads "Milburn Contracting Company"?

A. That is right.

Q. I ask you, sir, where was this picture taken; do you know the street or the road or avenue that this fronts on?

A. It is Milburn Avenue, sometimes called Coes Neck Road.

Q. Sir, did you make an inspection that day with me and the photographer of the physical confines behind that fence, the Milburn property?

A. Yes, I did.

Q. I ask you, sir, and it may seem redundant because it is portrayed in the photograph, but was there a 6-foot-high chain-link fence enclosing that property?

A. No, sir.

Q. As a matter of fact, sir, the fence you were standing in front of is made of what material?

A. Wood.

[fol. 133] Q. Would you tell his Honor in what condition that fence was and perhaps point out if there is anything with respect to condition?

A. It was in a very poor state of repair, it is falling over at one place, and there are several openings in it.

Q. Is there any concrete curb underneath that fence?

A. No, sir.

Q. Would you look at photograph No. 2, please, of Exhibit G. Will you tell his Honor where that photograph was taken?

A. This photograph was taken inside the Milburn sand pit property.

Q. Would you tell his Honor, please, what the material is that is in the foreground and background of the picture from the point where the photographer was standing looking in the direction the picture was taken?

A. Those were principally tin cans which had been incinerated.

Q. Were they covered with rust, Mr. Goldblatt?

A. Absolutely.

Q. Would you tell his Honor—looking at this shot No. 2 in your booklet of photographs, directly past the first little indentation of water, there is a bank, is there not?

A. Yes, sir.

Q. Would you tell his Honor, if you can, how sharp that decline was or what the angle of that bank was?

A. Approximately 45 degrees. Mr. Miller refers to the left central portion of the picture, as far as the angle of the bank goes.

Q. Would you turn to the next photograph, sir. Is that the one where you and I are standing?

A. Yes, sir.

Q. What is the material in the foreground floating in the water, Mr. Goldblatt?

A. Wood, boards.

Q. Mr. Goldblatt, are you familiar with the term known as clean unburnable fill?

A. I am.

[fol. 134] Q. Would boards and lumber be clean unburnable fill?

A. No, sir.

Q. Mr. Goldblatt, what is the approximate distance from where you are standing in this photograph from the fence to the beginning of the excavation?

A. Approximately a foot and a half.

Q. What would you say the angle of drop is along that bank?

A. Sharper than 45 degrees, perhaps 60 degrees.

Q. The next two shots—correct me if I am wrong—are general shots of the Milburn pit?

A. They are.

Q. And I again ask you, sir, is the material shown there clean unburnable fill?

A. It is not.

Q. What does it principally consist of?

A. Wood.

The Court: In what area of the Town of Hempstead is this Milburn pit located?

Mr. Miller: The Milburn pit, Judge, is directly south of Southern State Parkway near WHLI's towers; directly across the road from WHLI's towers you will see a pond.

The Court: In what village or post office area is it?
Mr. Miller: I think it would be Baldwin over there.

Q. Mr. Goldblatt, have you ever checked the map to answer his Honor's question as to what portion of the Township of Hempstead that would fall into?
A. I believe it is Baldwin.
Q. You believe it is Baldwin.

The Court: Near where the Milburn Country Club used to be?
[fol. 135] Mr. Miller: That antedates me, Judge.

Q. Do you have any knowledge of that, Mr. Goldblatt?
A. I am not familiar with that.
Q. Would you tell his Honor what is depicted on the next photograph? Is that this one?
A. Yes. That shows some more material that had been dumped on these same premises.
Q. Was that material clean unburnable fill?
A. No, it consisted principally of wood and trash.
Q. Would you turn to the next photograph, please, Mr. Goldblatt. Mr. Goldblatt, will you tell his Honor where this is located? This is at the Milburn pit, is it not?
A. That is at the Milburn pit adjoining the property of Southern State Parkway which I believe is Long Island State Park Commission.
Q. Is this the way in which you and I found the fence with that hole in it?
A. Yes, sir.
Q. Is that the way that we gained access to the property?
A. That is correct.
Q. Would you turn to the next photograph, please. Is that the one where you are standing with the tape measure?
A. Yes.
Q. Would you tell his Honor, please, and point out to the Court what the approximate size of the berm or distance is from the fence to the commencement of excavation at that point?
A. 1.75 feet.
Q. Mr. Goldblatt, I am on the next one where you are standing above me.
A. Right.

Q. Would you tell his Honor, this is also at the Milburn pit?

A. That's right.

Q. Along the border of Southern State Parkway?

A. That's right.

Q. Would you tell his Honor the distance from the fence [fol. 136] to the point of commencement of excavation as shown on that photograph?

A. 1.1 feet.

Q. Mr. Goldblatt, would you be good enough to point out also to the Court where the measuring rod was placed that I was holding; that is, was it placed at the farthest point against the fence, or was it placed against the fence post which would shorten the distance?

A. It was placed against the fabric of the fence rather than the post, which would give you a larger reading.

Q. In other words, increasing the size of the berm to its maximum at that point?

A. That's right.

Q. Would you look at the next photo, please?

A. Yes.

Q. Where was that taken and would you tell his Honor with relation to photo No. 1, which was the Milburn sign, if you would flip back please to the first page?

A. The photograph you are referring to was taken on Milburn Avenue north of the first photograph in this series, which property is being used by Standard Bitulithic under I imagine a rental agreement with Milburn who owns the premises.

Mr. Charles: I object to that.

Mr. Miller: I will consent that be stricken.

Q. Is this all on the same property?

A. Yes.

Q. In other words, the structure marked "Milburn" in photo No. 1 in this series and the structure shown here with the sign "Standard," is that all on the same property, one adjacent to the other on Milburn Avenue?

A. They are contiguous.

Q. I ask you, sir, was there a 6-foot chain-link fence sur- [fol. 137] rounding the property at this point?

A. No, sir.

Q. Was there any fencing of any kind, sir, and if so, would you tell the Court what it was and show and depict anything on the photograph.

A. A farm fence approximately, oh, 3½ to 4 feet high. I have my left hand on it.

Q. Would you go to the next exhibit, please. Before you change, was there a concrete curb under that fence 18 inches in depth?

A. At no point.

Q. As to the next photograph, would you tell the Court approximately where this picture was taken?

A. This was taken at the southernmost end of the canal which runs down the center of Peninsula Boulevard looking north.

Q. Mr. Goldblatt, have you previously been in the excavation business?

A. Yes, sir.

Q. Are you familiar with the approximate amount of cubic yards that would be taken out of an excavation if you saw it, roughly?

A. Roughly, yes.

Q. Would you say, sir, that the excavation depicted on this photograph encompasses the removal of in excess of 75 cubic yards of earth?

A. Absolutely.

Q. Was there a chain-link fence 6 feet in height set on an 18-inch concrete curb surrounding this excavation?

A. No, sir.

The Court: Is this not part of the brook that goes through Lynbrook and down?

Mr. Miller: If you go down Peninsula Boulevard, Judge, as soon as you go south of Merrick Road—

[fol. 138] The Court: That is part of a brook that has been there for centuries.

Mr. Miller: Yes, there is a stream and I believe that this runs into Mott Creek, if I am not mistaken, and then into Jamaica Bay.

Q. Would you tell his Honor where the next picture was taken.

A. The next picture was taken at Lee Lake.

Q. Where is Lee Lake?

A. In Woodmere.

Q. Is that off Peninsula Boulevard?

A. That's right.

Q. What is the approximate size of Lee Lake?

A. About 1,000 feet long.

Q. Do you know, sir, if the Town of Hempstead has storm drains into Lee Lake?

A. They have.

Q. In fact, are there any shown on this photograph?

A. Yes, there is.

Q. Will you point it out to the Court, please, on the right side?

A. On the right side at the center of the photograph there is what is known as a discharge wall.

Q. In the course of your investigation at Lee Lake did you find other discharge walls?

A. Yes, there were about a half dozen.

Q. What do you call them, catch basins up on the street?

A. They were connected to drainage basins on the street, yes, catch basins is the correct word.

Q. Surrounding the property shown on this photograph, Lee Lake, was there a chain-link fence 6 feet in height?

A. No, sir.

Q. Six feet in height set on an 18-inch curb?

A. No, sir.

[fol. 139] Q. Did you physically inspect the properties which are adjacent to the shoreline?

A. Yes, I did.

Q. Did you walk down to the shoreline?

A. I did.

Q. Would you tell his Honor in your own words, please, what you found at the shoreline with relation to the drop-off into the water?

A. I found that the drop was 45 degrees and sharper, and that it commenced in many instances right from the back yard of these homes which surround the lake.

Q. On those homes, Mr. Goldblatt, did you see evidence of children inhabiting those homes?

A. Oh, yes.

Q. Did you see children physically playing there?

A. Yes, sir.

Q. Sir, did you see other evidence such as bicycles and baby carriages and other things?

A. I did.

Q. And there are no fences, is that correct?

A. There is a fence in certain portions which is commonly known as snow fence.

Q. Those are the slats we see along the roads in the wintertime which the Department of Highways puts up?

A. About 3 feet high and it was in a bad state of repair.

Q. Would you go to the next photograph, Mr. Goldblatt, and tell the Court what is depicted on that photograph.

A. This is also a view of Lee Lake taken from the back yard of one of the homes and it shows in the lower right-hand corner a concrete slab which is a patio attached to the rear of this house. It also shows that the land runs right down to the water and that there is quite a sharp drop off.

[fol. 140] Q. What would you estimate the slope is at that point?

A. 45.

Q. Is it stable?

A. Yes.

Q. At 45 degrees there is stability?

A. Yes, there is.

Q. Did you see any evidence of cave-in or wash-out at 45-degree slope?

A. No, sir.

Q. Would you turn to the next photograph, sir. Would you tell his Honor what that was and where it was taken?

A. This is a photograph of a dredge in what I was told is known as Mott Creek, but it is adjacent to Lee Lake, I believe it is connected. They are dredging fill out of this lake, there is a dredge there, to build a new community of homes, and we were standing between this new community and the dredge at the time of the photograph was taken.

Q. If you would then incorporate the next photograph, I believe one is one view from one point, and then if you swung your body around you would get the next picture, is that right?

A. That's right. The first view showing the dredge is

facing toward the dredge; the other view is turned completely around facing toward the homes.

Q. Did you find people living in those homes?

A. Yes, there were.

Q. Was there any fence of any kind between the property on which you stood from where these pictures were taken down to the water?

A. No fence at all.

Q. Let me ask you, sir, what sort of a drop-off was it from that point down to the dredge pipe?

A. It was a very sharp drop.

Q. Would you tell his Honor where the next photograph was taken, Mr. Goldblatt?

[fol. 141] A. It was taken on Wantagh Avenue, that is a photograph of a Nassau County storm-water storage basin.

Q. Mr. Goldblatt, was this picture purposely taken through the fence for any reason?

A. Yes, it was.

Q. Would you tell his Honor and explain why you directed this picture to be taken that way.

A. We took the picture through the fence in order to relate the slope of the embankment to the diagonal effect of the wire mesh fence fabric, which is a 45-degree angle.

Q. Would you say the slope in there is a 45-degree angle, approximately?

A. I would say that.

Q. Is there any evidence of cave-in or breaking away of the earth with a slope of 45 degrees?

A. No, sir.

Q. Does it appear to you to be stable at 45 degrees?

A. It did.

Q. The next photograph, sir, was that taken from the same place but up higher?

A. That's right.

Q. Over the fence?

A. That was taken from a ladder up against the fence in the previous photograph.

Q. Mr. Goldblatt, past the fourth pole on the right, if you look carefully, would you point out to his Honor, I believe I see a person there, is that you?

A. It is.

Q. What are you holding in your hand, sir?

A. A 6-foot ruler.

Q. What was the distance of the berm from the fence to the edge of the excavation?

A. Five feet.

Q. On the next photograph, Mr. Goldblatt, will you tell the Court where that was taken?

[fol. 142] A. This was taken at a sump on Hempstead Turnpike in Levittown.

Q. Was that sump filled with water?

A. It was.

Q. Is that sump fully enclosed with a chain-link fence 6 feet in height?

A. Yes, it is.

Q. Was that chain-link fence set on a concrete curb 18 inches in depth?

A. No curb at all.

Q. Would you turn to the next photograph, please. Tell his Honor what is depicted on this.

A. This is an abandoned sand pit.

Q. Where is that located?

A. On Wantagh Avenue in Levittown.

Q. Is that property enclosed with a chain-link fence?

A. No, it is not.

Q. About how large would you say that excavation is?

A. Oh, it runs, the entire property is approximately 13 acres, and it is about 90 per cent dug out.

Q. So it is an excavation of some 10 or 11 acres?

A. Approximately 10 acres.

Q. No question then it is in excess of 75 cubic yards?

A. No, no question.

Q. And there is no fence of any kind surrounding that?

A. None at all.

Q. What would you say the depth of that pit is as opposed to the grade of Wantagh Avenue adjacent to it where the cars are shown on the left?

A. Approximately 15 feet.

The Court: That is a dry pit, is it not?

The Witness: It is.

Q. Would you tell his Honor, on the last two pictures, where they were taken and what they show?

A. These photographs, the first one shows a view on Peninsula Boulevard of a piece of property which, by the [fol. 143] sign which we saw of it here, belongs to the City of New York Water Supply Department.

Q. Was that property fully enclosed with a chain-link fence locked against public access except for purpose of gates for ingress and egress?

A. No, it was not.

Q. From the last photograph, the one taken close to the bank, would you tell the Court approximately what the angle of drop was down into the water?

A. That is pretty near a 60-degree drop, very sharp, sharper than 45.

Q. And even at 60 degrees, sir, was the slope stable?

A. Yes, it was.

Mr. Miller: If your Honor please, at this point may I respectfully ask for about a three-minute recess so I can set up a camera?

The Court: Certainly. Would you call these photographs here a brochure?

Mr. Miller: That is Defendants' Exhibit G.

The Court: And this cover?

Mr. Miller: That is the way the photographer delivered it to me.

The Court: It is in evidence now.

Mr. Miller: Surely.

The Court: Mr. Charles, you have your objection to all these pictures, is that right?

Mr. Charles: Yes. Before you set it up, what is the relevancy of this?

Mr. Miller: These motion pictures were taken by me personally, Judge, on the same excursion with Mr. Goldblatt covering principally these same points in the Town but taken of some different views.

[fol. 144] The Court: You have your objection again; same ruling.

Mr. Charles: Thank you.

(While the moving pictures were being projected upon the screen, the following took place:)

Mr. Miller: If your Honor pleases, these pictures commence at Lee Lake, they are taken in my presence and in the witness's presence, Mr. Goldblatt, who is at the screen with a pointer in his hand.

Q. Would you point out the banks and slopes and any drainage points, Mr. Goldblatt.

A. That is the drainage, that is the drainage wall.

Q. That is one of the culverts, I believe, shown on one of the other exhibits, is it not?

A. Right.

Q. Would you point out anything with respect to the back yards, the absence of fences, the presence of fences, as it goes along.

A. Right in here there are no fences. These homes which abut the lake have no fence.

Q. What is that shown there?

A. That is another culvert.

Q. Is that the storm fence you referred to before, Mr. Goldblatt?

A. The snow fence.

Q. And that is the only protection you found around that bank at that point of Lee Lake?

A. That's right.

Q. Is that another culvert behind the fence there?

A. Right in here, yes.

Q. Was that fence in good repair or did it have holes in it?

A. It had holes in it and was in very bad repair.

There is another culvert.

[fol. 145] Q. Mr. Goldblatt, would you please point out to the Court, before I move this film, the circumstances under which this was taken and what is depicted on the screen now.

A. This is a shot from the other side of Lee Lake showing where a portion of chain-link fence had been erected, and it shows a rather large hole under the fence, in fact the whole fence appears to be up on stilts.

Q. It will be clearer when I turn on more light when it runs, but would you say it was large enough for you and I both to crawl through with ease?

A. Yes, on top of each other.

Q. Was there any concrete curb underneath that fence or just the concrete where your pointer is now in which each post is imbedded?

A. That's right, no curb, just the post.

Q. As I run it again, will you point out to the Court, please, with your pointer the distance under the fence which you have just testified to?

A. Right in here.

Q. There was no fence there at all?

A. Along here too. That is right.

Q. In other words, the land has all eroded underneath it?

A. That is right.

Q. I will run it backwards now.

A. Same thing, you can see it right through here. The fabric stops at this line and the earth is right down here.

Q. What is that object just coming into view now, Mr. Goldblatt?

A. That is a catch basin, a drainage catch basin.

Q. So there is drainage from that street into the lake?

A. That's right.

Q. Now would you tell his Honor, please, what is coming up on this next sequence.

A. This is a view of the rear of one of the homes adjoining Lee Lake, and we are coming down the patio showing [fol. 146] the embankment running right off to the water, you can see.

Q. What sort of a drop would you say that was as to angle?

A. At that edge, would you reverse it, please?

Q. All right.

A. At this edge here it drops down at a 45.

Q. That is Lee Lake, is it not?

A. That is right. This shows some of the homes on the other side without any fence at all; the lawns run right down to the water.

Mr. Miller: I would just like to say for the record that I am giving the plaintiff the benefit of the doubt, Judge, by taking it in color so it enhances the pictures. If I had taken it in black and white, I think it would have looked more to

their detriment. I just wanted to appear fair with the object of color.

The Court: I am sure.

Q. What is that, Mr. Goldblatt?
A. This is a view in Milburn's pit.
Q. That is Lee Lake, is it not?
A. No, that is still Lee Lake, I am sorry.
Q. Is that a slope from a back yard?
A. That is right.
Q. What angle would you say that slope is on, sir?
A. That shows the 45-degree quite clearly.
Q. Now would you tell his Honor what you found at this point on Lee Lake.
A. This was the rear of one of the homes which abut right up against the lake and there is a child's playhouse with a doll carriage.
Q. What sort of drop is it off of there into the water?
[fol. 147] A. This is a perpendicular drop along this edge.
Q. You stand close to the water, Mr. Goldblatt?
A. I did.
Q. Did you throw rocks in the water or in any way estimate approximately how deep that is?

Mr. Charles: Do I have a general exception?

The Court: You can have an objection to this question. Are you an expert in measuring the depth of water by throwing rocks, Mr. Goldblatt?

The Witness: I would have had to use a plumb line, your Honor, and I didn't. But I was informed—

Q. Not what you were informed.
A. O. K.
Q. Was the water clear, Mr. Goldblatt?
A. Yes, it was.
Q. Could you see down to the bottom?
A. Well, not too well.
Q. And this was a playhouse, you say, for children?
A. That's right.
Q. Where is this located, Mr. Goldblatt?
A. This is a shot of one of the discharge pipes coming into Lee Lake.

Q. There are houses adjacent to the discharge canal?

A. Yes, it shows the continuity into the canal which runs into Lee Lake. This is one of the canals that runs in, it shows continuity right up to the back yards of these people without any fence.

Q. Do you recall where this was?

A. This was on Mott Creek adjacent to Lee Lake.

Q. That is where you stood to take those other pictures, is it not?

A. That's right.

[fol. 148] Q. Now you are going back up on the bank where you stood?

A. That's right.

Q. What sort of drop was that down from this point down to the pipe which is now coming into the picture?

A. That was very sharp, it was about 45, I would say.

Q. What is that, sir?

A. This is the discharge pipe through which that dredge which is coming into view sucks material out of the bottom of the lake and puts it up on the land to reclaim land for housing purposes.

Q. Is there any fence at that point at all, Mr. Goldblatt?

A. No fence.

Q. That is the adjacent area, is it not?

A. That's right, this is part of the land which has been filled in by that dredge.

Q. Now, there is a house under construction. Were there houses on that street already lived in?

A. Yes, further down.

Q. Did you see children playing around there?

A. I did.

Q. This, is it not, is going around a 360-degree circle?

A. That's right.

Q. Now these homes over here were lived in, were they not?

A. That's right.

Q. Were there any fences there from the back yards dropping off into that canal?

A. No, the property runs right down into the Mott Creek there, which is being dredged.

Q. What is this, sir?

A. This is a view northward of Peninsula Boulevard, the same location as the picture was taken in the other exhibit.

Q. The houses abut directly on that drainage canal on Peninsula Boulevard, do they not?

A. Yes, they do, right over in here.

[fol. 149] Q. Is this what you testified to as to the sign which reads "City of New York"?

A. That is right, it is very hard to see here, but it does say that "City of New York, Water Supply property."

Q. And that point there which you just passed on the film is the end of the fence, is it not?

A. That is correct, there is a wide-open area where there is no fence at all.

Q. Does that fence have a concrete curb underneath it?

A. No, sir.

Q. So, at this point where the camera is now going there was open access to that?

A. That's right.

Q. And just at this point now in the foreground how deep is that drop?

A. That is the very sharp drop, it goes down about 20 feet, about at a 60-degree angle right down to the water.

Q. Could you estimate the approximate size of this body of water?

A. I would say it covers about ten acres.

Q. There are houses on the other side?

A. That's right.

Q. Is that you in the picture, sir?

A. It is.

Q. Now would you tell the Court where we are now on this point of film?

A. Would you show this a little more so I can orient myself?

Q. Yes.

A. This is the Milburn sand pit.

Q. Is that where we entered Milburn pit?

A. That's right, through this opening in the fence.

Q. Let us just go back for a minute and start at the beginning of this sequence.

At this point, sir, is it correct we stopped off at Southern State Parkway adjacent to these homes?

A. That's right.

Q. And we found this fence?

A. That's right.

[fol. 150] Q. Is that fence in good repair?

A. No, there is a large hole which is coming up.

Q. Point out the size of the hole.

A. From here to here (indicating).

Q. That is completely wide-open, is that correct?

A. From top to bottom, about four feet wide, five feet.

Q. From that point we walked in. Is that the Milburn pit in the background, the water?

A. That is correct.

Q. Is that the debris you showed to the Court in the other photograph, the still photo?

A. That is right.

Q. Would that be clean nonburnable fill, Mr. Goldblatt?

A. No, it is wood.

Q. Now what is the angle of that slope there, Mr. Goldblatt? This is the vicinity of where the other pictures were taken where we held the measuring sticks, is it not, sir?

A. That's right, and it is about a 45-degree angle.

Q. Was that an angle of repose? Was there any cave-in there?

A. It was an angle of repose.

Q. You would say this bank was stable at that point?

A. I would.

Q. This is a general sweeping view of the Milburn pit, is that correct?

A. That's right.

Q. And homes around that pit on all sides, are there not, except for parkway on the north?

A. That's right.

Q. Where is this, sir?

A. This is on Wantagh Avenue, the abandoned sand pit, which is in the other exhibit.

Q. Any fence of any kind surrounding that property, a chain-link set on an 18-inch curb?

A. No, sir.

[fol. 151] By the Court:

Q. Is there any water in that?
A. No, there is not, your Honor.

Mr. Miller: May I point out for the record that the ordinance does not specify that pits with water must be fenced in. It says any excavation, and an excavation is denominated 75 cubic yards.

The Court: You argue that in the brief.

By Mr. Miller:

Q. Where was this taken, Mr. Goldblatt?
A. This is on Wantagh Avenue.
Q. Is that the one across the street?
A. Nassau County drainage sump, yes.
Q. I think the other pictures came out better.
A. Yes, this shows the five-foot-wide berm, though.

Mr. Miller: Off the record, it was getting cloudy at that point, Judge.

Q. Where is this, Mr. Goldblatt?
A. This is the other sump on Hempstead Turnpike with water in it.
Q. Have you seen that sump on other occasions?
A. Yes, I have.
Q. Does it always have water in it, Mr. Goldblatt, any time you were there?
A. Yes, it always had water.
Q. Was there a concrete curb underneath that fence?
A. No, sir. This shows the bottom edge here.

[fol. 152] Mr. Miller: That is all.

As soon as I can run that film back through the projector, I would like to have that marked as Defendants' Exhibit H in evidence.

The Court: With the usual objection by Mr. Charles, and Mr. Charles' exceptions also.

Q. Mr. Goldblatt, I believe yesterday you said your sand and gravel business has been in existence for some thirty-two years, is that correct?
A. That is right.

Q. Would you say, sir, that that represents a rather substantial investment in money and equipment?

A. Rather.

Q. Just in round figures, would say it runs into hundreds of thousands of dollars?

Mr. Charles: I object to it.

The Court: Sustained.

Q. Do you know of your own knowledge, sir, approximately what the value of your investment is in structures and equipment at this 38-acre pit?

Mr. Charles: Same objection.

The Court: Sustained.

Q. Do you know, sir, what the assessed valuation is of the sand pit on the tax rolls of the County of Nassau?

Mr. Charles: Same objection, your Honor.

[fol. 153] The Court: I will allow that, if he knows.

A. Approximately $66,000.

Q. Mr. Goldblatt, I am going to ask you a series of questions in connection with items specified in the complaint in this action. The complaint in this action in paragraph eleventh reads, "At various locations the pit excavation commences within 20 feet from the adjoining property line," and I ask you, sir, with reference to that alleged violation, what the distance was from the property line to the commencement of the excavation prior to 1945.

Mr. Miller: That is the date of the ordinance, Judge.

A. Substantially the same as it is today.

Q. I take it, then, substantially the same as shown on plaintiff's exhibits in this case, the cross-sections?

A. Yes, with respect to the width of the top of the berms at various places.

Q. And that width, Mr. Goldblatt, is it wide enough for you to traverse it with equipment?

Mr. Charles: I object to that.

The Court: What kind of equipment?

Q. Can you drive a car around that berm?

Mr. Charles: I object to that.
The Court: I will allow it.

A. Yes, we can.
Q. I will change it to, have you driven a car around it?
A. I have.

[fol. 154] The Court: How wide is a car?

Q. How wide is a car, Mr. Goldblatt?
A. A car is about 7 feet wide.
Q. Have you driven any other equipment around it aside from motor vehicles?
A. Yes, I have.
Q. What equipment?
A. We have run trucks around there, dump trucks.
Q. How wide are dump trucks?
A. Eight feet. We have run bulldozers around it, which run about ten feet in width.
Q. I am reading again from the complaint in this action, Mr. Goldblatt, "In certain places the pit excavation is more than 10 feet below the established grade of the nearest public street and the incline of the side walls is more than 2 horizontal feet to 1 vertical foot," and I ask you, sir, at what angle is 2 on 1, 2 horizontal over 1 vertical?
A. 30-degree declined angle.
Q. And what angle, sir, is a 1 on 1?
A. 45 degrees.
Q. You have seen the cross-sections in this action, have you not, of Mr. Ott?
A. Yes, I have.
Q. Do you recall what angles as depicted on the plaintiff's exhibit your slopes are?
A. They are slightly more gentle than 45 degrees; approximately 40 degrees.
Q. Would you tell me, please, what the angle was, approximately the angle around that pit, prior to 1945?

Mr. Charles: Same objection, your Honor.
The Court: Same ruling.

[fol. 155] A. From 40 to 45 degrees.
Q. To your personal memory how far back in point of time would you say there existed a 40-, 45-degree slope there?

A. Back as far as 1930 or thereabouts.

Q. You have been personally engaged in this business?

A. Yes, I have.

Q. I mean with the exception of illness or vacation, you daily go there, is that correct?

A. That is right.

Q. Will you tell the Court whether there has ever been a cave-in or tearing away of the bank around this pit?

Mr. Charles: I object to that.

The Court: I will allow it.

A. No.

Q. Mr. Goldblatt, aside from the sand and gravel business, have you been engaged in any other business?

Mr. Charles: I object to that on the grounds it is completely immaterial.

The Court: It may be; I will allow it.

Mr. Miller: Subject to connection, Judge. I want to qualify him for something.

A. Yes, I have.

Q. What business was that?

A. The excavation, excavating business.

Q. Being engaged in that excavation business, did you from time to time build what we call sumps or drainage basins?

Mr. Charles: I object to it.

The Court: I will allow it.

[fol. 156] A. Yes, we did.

Q. Did you personally supervise the construction of them?

A. Yes, I did.

Q. As a matter of fact, did you personally operate any equipment on any of these jobs?

A. At that time, yes.

Q. Were these sumps later dedicated to the County of Nassau?

A. They were.

Q. As a result of your experience in the excavation business, can you tell this Court what an angle of repose is with respect to a side slope of a pit?

A. 45 degrees.

The Court: Angle of what?
Mr. Miller: Angle of repose.

Q. In other words, you feel a 45-degree angle is a safe angle and the bank would be stable?

Mr. Charles: I object to that, your Honor.
The Court: Objection sustained.

Q. Would a 45-degree bank be stable?

Mr. Charles: I object to that.
The Court: Stable in what respect?
Mr. Miller: Stable so it does not cave in.
The Court: I will allow it.
Mr. Miller: That is what you call an angle of repose, Judge, stability of the earth.
The Court: I will allow it.
Mr. Charles: If it was clay, that is one thing; if it was rock—
[fol. 157] The Court: He has been in the business for about twenty or so years and he is in a position to testify as to whether this 45-degree angle, whatever it is, to which he has testified, would or would not.

A. It would be stable.

The Court: Your objection is primarily on materiality and relevancy?
Mr. Charles: That is right.

Q. The next sentence of this paragraph eleventh of the complaint, Mr. Goldblatt, is this: "There is no concrete curb beneath the fence which encloses the described property." I ask you, sir, have you personally visited various excavations and sumps in the Town of Hempstead?
A. I have.

Mr. Charles: Same objection.
The Court: You have your objection.

Q. Did you make personal investigation to see whether there was a concrete curb under any of the excavations or sumps in the Town of Hempstead that you visited?

A. I did.

Q. Would you tell the Court just briefly some of the places that you visited and what you found with respect to concrete curbing.

A. We visited the abandoned pit on Wantagh Avenue where there was no fence at all. We visited the sump on Wantagh Avenue opposite the abandoned sand pit on which there was no curb under the fence. We visited Milburn's sand pit which had no curb under such fence as was there. We visited Lee Lake which had no fence [fol. 158] at all except for this snow fence and that had no curb, and along Peninsula Boulevard there was just the crash rails along the highway. And then also on Peninsula Boulevard we visited the property of the City of New York, Water Supply Department, which was not enclosed by a fence, but the fence that was there, a certain portion of it, did not have any curb on it.

Q. The next paragraph of the complaint, or, rather, the next sentence of paragraph eleventh, reads: "And said fence contains openings, other than necessary gates for ingress and egress, which permit public access to the pits and slopes." I ask you, sir, do you make a personal inspection and cause to be made by your employees a personal inspection of your fence?

A. Yes, I do.

Q. With what degree of regularity?

A. Twice a week.

Q. Are you able to tell this Court whether there exists any openings in that fence other than gates for ingress and egress?

A. There are no such openings.

Q. Is there anything which would permit public access to the pits and slopes?

A. No. They would have to come through the gate. We only keep one gate open, the main gate, when we are open for business.

Q. I read again: "The pit has been excavated substantially beyond points 2 feet above the maximum ground water levels at the site." I believe we started on this point yesterday just before we adjourned and you testified that that would mean an elevation of roughly 52?

A. The ground water elevation?

Q. The ground water elevation is 50 and therefore 2 [fol. 159] feet above maximum ground water would be 52.

A. That is right.

Q. This allegation is that you have excavated substantially beyond or below elevation 52?

A. Right.

Q. Would you tell the Court when for the first time the excavation at this pit, to your knowledge, was below 2 feet above maximum ground water level?

Mr. Charles: Same objection.

The Court: Same ruling.

A. Around 1930.

Q. Mr. Goldblatt, were you present at the trial of the action before Mr. Justice Hill?

A. I was.

Q. Do you recall the testimony of Mr. Molitor with respect to the lake at your property?

A. Yes, I do.

Mr. Miller: Do you have any objection to putting this in?

Mr. Charles: I will concede that this is a true transcript of the testimony taken at the trial, but I will object to its materiality and relevancy on the same basis that I objected before.

The Court: Is that the testimony taken at the previous trial, the judgment of which Mr. Miller claims is res judicata?

Mr. Charles: Yes, sir.

The Court: To that extent it is material then, is it not?

Mr. Charles: I will withdraw my objection, if the entire minutes go in and not an excerpt.

[fol. 160] The Court: I would say that the minutes of that whole trial and the decision and the judgment all together are relevant on the issue of res judicata.

Mr. Charles: But not excerpts.

Mr. Miller: I presume, then, there is a concession that if I offer this in evidence there will be no objection, the entire minutes.

The Court: On the issue of res judicata.

Mr. Charles: But there is an objection as to the materiality under your second defense.

The Court: Whose testimony is that?

Mr. Miller: There were two points I was going to read; one is a Mr. Molitor who was operating in the pit.

The Court: It is not Mr. Goldblatt.

Mr. Charles: No.

Mr. Miller: No, who was operating in 1927, and the other is Mr. Fay who sold the original equipment down there in 1927 as to the original excavation.

The Court: At the present moment it is only allowable on affirmative defense number one, res judicata. Otherwise, it is pure hearsay.

Mr. Miller: If your Honor please, the purpose of offering any portions of the testimony here at this point is to establish under the res judicata question the initial commencement of excavation there which was deemed protected by the judgment of Mr. Justice Hill. It is just a point of reference of time.

[fol. 161] The Court: It is just on the question of res judicata.

(Received in evidence and marked Defendants' Exhibit I.)

Mr. Miller: I want to read one point in the exhibit.

Mr. Charles: As I understood it, you were sustaining my objection on any evidence read from this on the second defense.

The Court: It is only allowable on the first affirmative defense, res judicata. The whole thing is in evidence now.

Mr. Miller: Yes, and I am just pointing out—the whole thing is in evidence—and I wish to point out to the Court one portion, two portions thereof with respect to the original commencement of excavation and water at this site which has been adjudicated as a lawful nonconforming use. That is the first defense.

The Court: Can you not take care of that in your brief later on instead of reading it? It is all in evidence now.

Mr. Miller: Yes, fine, thank you.

Q. The final allegation in paragraph eleventh of the complaint, Mr. Goldblatt, is this: "Defendants have failed

to refill the pit excavation or parts thereof in those places where earth has already been removed to the maximum extent allowed under the ordinance." I ask you, sir, number one, is there any portion of your pit where you have removed to the maximum extent allowed under the ordinance?

A. No.

[fol. 162] Mr. Charles: I object to that on the grounds it is conclusion of law.

The Court: Sustained.

Mr. Miller: You may inquire.

The Court: I assume your cross-examination is going to be very short. Use your own judgment, of course.

Mr. Charles: It will.

Cross examination.

By Mr. Charles:

Q. Mr. Goldblatt, you testified that you made two inspections a week around the fence of the pit, is that correct?

A. I did.

Q. And you do that all the time?

A. Yes.

Q. What do you do it for?

A. We do it to make sure that the fence is in proper condition so as to prevent people from getting in there who have no right to be in there.

Q. Sometimes you do find holes under the fence?

A. Sometimes.

Q. Did you ever see anybody making one of those holes?

A. No.

Q. In the whole thirty years you have been there you never saw anybody at any time making one of those holes that you found?

A. I have never seen anyone making a hole.

Q. But you have found holes under the fence?

A. Yes.

Q. You spoke about the abandoned sand pit on the east side of Wantagh Avenue?

A. Yes.
Q. Did not your father own that pit?
A. He did.

Mr. Miller: I object to the question; it is immaterial who owned it.

The Court: I will allow it.

[fol. 163] Mr. Miller: Will counsel fix a time? Owned it when? I think I am entitled to have the time fixed, Judge.

The Court: You can develop that on redirect if you wish, if you think it is important enough.

Q. You spoke about the Milburn sand pit?
A. Yes.
Q. Is that an operating pit at the present time?
A. Not at present.

Mr. Charles: That is all.
Mr. Miller: I have no further questions.

(The witness was excused.)

Mr. Miller: I call Mr. Merklin.

Francis X. Merklin, residing at 43 East Bedell Street, Freeport, New York, called as a witness by the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Merklin, what is your occupation?
A. I am a licensed professional engineer.
Q. Are you testifying here today as a result of subpoena?
A. I am.
Q. By whom are you employed?
A. The County of Nassau, in the Department of Public Works.
Q. What is your position there?
A. Principal drainage designer.
Q. In the course of your duties with the Public Works Department of the County, are you familiar with what [fol. 164] we call sumps or drainage basins?

A. I am.

Mr. Charles: May I have the same objection, your Honor, to this testimony?

The Court: We have not heard what he is going to testify to yet. He is merely being asked about his qualifications, and so forth.

Q. Do you from time to time visit sumps?
A. I do.
Q. Do you as part of your duties have anything to do with plans for sumps?
A. I do.
Q. Anything to do with size of sumps?
A. I do.
Q. The width of berms?
A. Yes.
Q. Type of enclosure?
A. Yes.
Q. That all comes within your department, does it not?
A. That is correct.
Q. Now would you tell me, please, how many sumps there are, total number, owned by the County of Nassau?

Mr. Charles: I object to it.

The Court: You have your objection. Overruled, according to my reasons given yesterday and early this morning.

A. I cannot answer that directly. There are some 400 sumps in the County of Nassau, but just how many are owned by the County at the present time is difficult to determine because some are in the process of construction by developers and other municipalities which have not yet been turned over to the jurisdiction of the County of Nassau.

[fol. 165] Q. Mr. Merklin, I passed a sump on Newbridge Avenue just south of Old Country Road this morning and I believe the number on there was 315. Would that give you any idea? You know the green sign which says "County of Nassau" and the number.

A. They are numbered and I would have to refer to a map to know which sump you have reference to.

Q. I saw a number that said 315. Would that perhaps refresh your recollection as to how many sumps the County has?

A. It would indicate that it has 315, but it could be 350 or 375, I wouldn't know.

Q. For the sake of argument, in other words, shall we say there are at least 300?

A. Yes, you may assume that.

Q. All right. Are these 300 sumps, whatever the exact number is, all enclosed with a chain-link fence 6 feet in height?

A. They are.

Q. Are they all locked against public access and egress except for gates?

A. They are.

Q. And those gates are locked?

A. That is right.

Q. Are all of these fences on these 300-odd sumps set upon a concrete curb 18 inches in depth?

A. They are not.

Q. How many would you say are and how many are not?

A. I wouldn't estimate a guess. Originally, they were not set in concrete curbs, but subsequent to December 15, 1952, they were required to be set on concrete curbs.

Q. Would you say there was a substantial number built prior to December 1952 out of those 300-odd?

A. Depends on what you call a substantial number. In my opinion, yes.

[fol. 166] Q. Would you say 100, 150?

A. I would say 100.

Q. You would say 100. So there are at least 100 sumps owned by the County of Nassau which do not have a concrete curb under the fence, is that correct?

A. That might very well be.

Q. Does the County of Nassau have any specifications with respect to size of berm? You know what I am referring to?

A. Yes, I know what you are referring to.

Q. The width of the periphery between the fence enclosure and the commencement of excavation.

A. There are no written specifications on that. It is a

matter of practice adopted by our department and the approval of the plans for the construction of these sumps.

Q. As a matter of course what does your department approve as to size of berm, width of berm?

A. It varies under different conditions. Where the fence separates a sump being built by developer from other property owned by the developer, the distance is 11 feet from the property line to the top of slope, 10 feet from the fence to the top of slope, the fence being set 1 foot off the property line. Where it abuts adjoining property that is not controlled by the person constructing the fence, the required berm is 16 feet, 1 foot from the property line to the fence, 5 feet for landscaping, an additional 10 feet to the top of slope. Where the slope abuts a street line, the distance is 15 to 16 feet as minimum.

Q. In the course of your duties, Mr. Merklin, have you personally inspected sumps owned by the County located within the Township of Hempstead?

A. I have on occasion. It is not general practice that I inspect them.

[fol. 167] Q. I show you a photograph as part of this multiple exhibit, showing what Mr. Goldblatt said was an excavation located in the westerly side of Wantagh Avenue in Levittown, and ask you if you have ever seen that pit.

A. Is this the first pit north of Hempstead Turnpike on the westerly side of Wantagh Avenue?

Q. I think there is a little one in back of the stores, is there not?

A. I am not sure of that, but is this directly opposite the old sand pit?

Q. Yes, almost directly opposite, about 900 feet north of Hempstead Turnpike.

A. I have seen it.

Q. You have seen it?

A. Yes.

Q. Would you say that is a true and correct representation of the sump?

A. I would believe it to be, yes.

Q. And that sump is owned by the County of Nassau?

A. I believe it is.

Q. And is located within the confines of the Township of Hempstead?

A. That is correct.

Q. Do you see Mr. Goldblatt in the right of the photograph holding a rule through the fence?

A. Yes, I do.

Q. It is not too distinct, but do you see him there?

A. Yes, I do.

Q. Did you hear his testimony here today that the distance of the width of that berm is 5 feet?

A. I did hear it.

Q. Are you in any way from that photograph, or from your personal knowledge of that sump, able to state whether his measurement of 5 feet was correct?

A. I am not sure of it, I didn't make any inspection for that purpose; I have seen this sump on various occasions; I have also seen many others; I would not, without more [fol. 168] recent inspection, estimate what the width of the berm is. It appears to be less than 10 feet in this particular case, I will say that.

Q. Did you at any time in the course of your duties with the County of Nassau receive any communication, summons, complaint, or other document from the Town of Hempstead or the Town Attorney of the Town of Hempstead or the District Court of the County of Nassau with respect to the enforcement of Ordinance No. 16 of the Town of Hempstead as against the sumps under your jurisdiction?

Mr. Charles: I object to that on the grounds it is immaterial, irrelevant and incompetent.

The Court: Sustained.

Q. On the photograph you are looking at you say you visited that sump?

A. I have seen it on occasion, I have had no specific reason to visit it, in driving around I have seen it.

Q. Would you look at the photo just prior to the one of that sump on Wantagh Avenue, and that is the photograph which was shot through a chain-link fence?

A. Yes.

Q. The entire photograph basically covered with the fenc-

ing, the criss-cross of the fencing or the face of the photograph, so we have the right one.

A. That is right.

Q. I ask you, sir, did you hear Mr. Goldblatt's testimony that the angle of the strands on that fence is approximately 45 degrees?

A. I did.

Q. Would you agree with that, sir?

A. I would.

Q. Now looking through those angles and looking at the slope beyond, would you say that it is a fair statement that the slope on that bank is approximately 45 degrees? [fol. 169] A. Not as a result of referring to the angle of the wires on the fence, because the angle at which the picture is taken could vary the impression given. I would therefore not make any estimate of the slope of the sump as a result of that.

Q. Would you also look at the adjacent photograph which was taken standing above the fence, the one with Mr. Goldblatt in it?

A. Yes.

Q. And I ask you, sir, if there is anything in that photograph that would enable you to say what the approximate angle of the slope was at that wall, of that pit.

A. It would look to me as though it varies, that it would be flat in the foreground of the picture, flatter than 45, and it might go up to 45 as you got away from the camera. I believe that the picture is deceptive for purposes of estimating the slope. I wouldn't attempt to estimate the slope.

Q. Have you seen slopes of 45 degrees?

A. I have seen some yes.

Q. In County sumps?

A. Yes, I have seen some.

Q. In the Town of Hempstead?

A. Yes.

Q. At the time you saw them, were the banks stable at 45 degrees?

A. In some cases they were, and in some cases they weren't. The stability depends on the number of conditions surrounding that particular sump.

Q. Mr. Merklin, back in January of this year did the Department of Public Works make a survey of the sand pit the subject matter of this proceeding?

Mr. Charles: When?

Mr. Miller: January.

[fol. 170] A. Yes, the Department of Public Works made a partial survey of the southerly end of the sand pit.

Q. Did the Department of Public Works retain the firm of Lockwood, Kessler & Barlett thereafter to make a topographical map and cross-section of this sand pit?

A. They did.

Q. Did you personally have any conversations with respect to that retainer for those services?

A. With respect to the retainer, no. I was just informed that they were employed by the Department of Public Works to make that survey and had conversations with Mr. Ott as to what information to get for our purposes in the Department of Public Works.

Q. That is what I was leading up to. Mr. Ott testified, I believe, that he spoke with you.

A. That is correct.

Q. In connection with this. Now would you tell me, please, in your own words, what your conversation was with Mr. Ott with respect to the work to be done at the subject property?

A. To obtain a complete topographical survey of the sand pit, and such topographical survey, of course, would be the elevations on the top and at the fence line, the adjacent street, along the slopes, elevation of the surface of the water, and elevations of the slopes and bottom below water; a complete topographical survey, in other words.

Q. And the work that Lockwood, Kessler & Barlett did was to be rendered for the Department of Public Works of the County of Nassau?

A. That is correct.

Q. That is your department, I mean you are associated with that department?

A. That is right.

[fol. 171] Q. Was that to complete work which you had started? You say you did a partial survey.

A. Well, it was actually to do over the work that we had started, and in addition to the completion of it.

Mr. Charles: I move to strike that out on the grounds, your Honor, that this is a part, as I see it, of the third distinct defense which you struck from the pleadings yesterday.

Mr. Miller: I have not asked him anything which—

The Court: If it pertains to the third affirmative defense, of course, it is not allowable. Mr. Miller is contending this has to do with the second affirmative defense. I do not know, maybe, maybe not. As I say, it is hard to say at this moment what is relevant and material under that second affirmative defense, because he has everything in there.

Mr. Miller: You may inquire.

Cross examination.

By Mr. Charles:

Q. All of the sump basins are supervised and maintained by the County, are they not, the ones under the jurisdiction—

A. The ones under the jurisdiction of the County, right.

Q. And all of them have been constructed, have they not, Mr. Merklin, so that the bottom of the pits of the basins are above the maximum ground water level?

A. That is probably 99 per cent true. There may be one or two that have accidentally been constructed below the maximum ground water table to the extent of perhaps a foot or so.

[fol. 172] Q. But the standard regulation for the construction of them calls for the bottom—

A. A minimum of 2 feet above maximum ground water.

Mr. Charles: That is all.

Redirect examination.

By Mr. Miller:

Q. Mr. Merklin, on this 1 per cent that perhaps was by accident below 2 feet above ground water, is it correct that if you went to that extent you would have a lake, I mean once you get below maximum?

A. You would have water standing in the bottom of the basin at such time as the ground water was at its maximum level.

Q. Are you, sir, familiar with the sump located on the northerly side of Hempstead Turnpike about 100 feet west of Division Avenue at Levittown Center?

A. I am.

Q. Is it not a fact, sir, that that sump always has water in it?

A. It has always had water in it when I have seen it, yes.

Q. Have you ever examined that sump to see if there is a concrete curb under the fence?

A. I have never examined it for that purpose.

Q. Do you know of your own knowledge whether there is a concrete curb under that fence?

A. I don't think there is one.

Q. That was constructed much prior to 1952, was it not?

A. Yes.

Q. That was there when Levitt built in 1948, 1949, and 1950?

A. It was built by Levitt.

Q. It was built by Levitt at about that time?

A. I wouldn't hazard a guess as to the date.

Q. Do you recall when Levitt started to build?

A. Levitt started to build after World War II.

[fol. 173] Q. In any event, is it safe to say that substantially prior to 1952 that sump was built?

A. Yes, I would say so.

Q. And it is your testimony that prior to 1952 no concrete curbs were required under fences?

A. That is correct.

Q. Have you, that is, your department, gone back to all the old ones and reinstalled concrete curbs under the existing fences?

Mr. Charles: I object to that, your Honor.
The Court: I will allow it.

A. No, we have not.

Mr. Miller: That is all.
The Court: These are County sumps?
The Witness: That is right.
Mr. Miller: That are located in the Town of Hempstead?
The Witness: That is right.
Mr. Charles: No further questions.

(The witness was excused.)

Mr. Miller: I call Mr. Young.

JOHN C. YOUNG, residing at 78 Marlboro Road, West Hempstead, New York, called as a witness by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Young, would you state your occupation, please?
A. I am manager of the Building Department in the Town of Hempstead.
[fol. 174] Q. Are you appearing here today pursuant to a subpoena?
A. Yes.
Q. Would you tell me, sir, how long you have been associated with the Town of Hempstead?
A. Since May of 1937.
Q. In that period of time what titles or positions have you held with the Town Hempstead?
A. At the beginning it was chief building inspector, and in the latter half of that period I presume it was manager.
Q. How long, sir, have you lived within the County of Nassau?
A. Since 1929.
Q. Are you familiar with the subject matter of this proceeding, 38-acre sand pit in East Meadow?
A. Yes.

Q. Have you personally visited the premises on occasion?

A. Yes, some time ago.

Q. When would you say, approximately your first visit to that place was?

A. Ten or more years ago.

Q. In the course of your duties is it part of your job to enforce in any way the ordinances of the Town of Hempstead for which you work?

A. Yes.

Q. Is it part of the duties of your department or under your supervision to make inspections of real property with respect to the conformity or possible violation of any ordinances?

A. No, I wouldn't say it is. We inspect properties—

Q. Let me ask you this to make it easier: Are the building inspectors under your jurisdiction?

A. They were, yes.

Q. When they were under your jurisdiction they made inspections, did they not?

A. That is right.

[fol. 175] Q. If they found anything that violated an ordinance, did they issue a summons?

A. They did.

Q. From time to time is it not a fact that you yourself have issued summonses?

A. Yes.

Q. And those are summonses as an alleged violation of an ordinance of the Town of Hempstead?

A. That is right.

Q. Those are returnable in the District Court of the County of Nassau?

A. Yes, sir.

Q. Do you have any personal knowledge, Mr. Young, of a proceeding in the District Court of the County of Nassau with respect to the subject property concerning the erection of a fence at the property?

A. Yes, the one—

Mr. Charles: Just a moment. I object to this on the same ground as before, your Honor.

The Court: Sustained.

Mr. Miller: Your Honor sustained that?

The Court: I did.

Mr. Miller: That he has personal knowledge of a proceeding in the District Court?

The Court: I am not interested in that proceeding in the District Court, legally.

Q. Did you make an inspection of the sand pit in this proceeding with respect to the fencing ordinance of the Town of Hempstead?

A. Yes. You mean ten years ago?

Q. Whenever it was.

A. Ten years ago, yes, I did.

Q. At that time was the fence constructed around the perimeter of this property?

[fol. 176] Mr. Charles: I object to that as not being within the issues of this trial.

The Court: I will allow it. It has to do with the subject property, does it not?

Mr. Miller: Yes, it has to do with the matter in the complaint of a curb underneath the fence.

The Court: I will allow it.

(The last question was read.)

A. Yes, practically a whole new fence was constructed around the property.

Q. Did you make personal inspection of that fence?

A. I did.

Q. What type of fence was that, sir?

A. Chain-link fence 6 foot high.

Q. After the erection of that fence did you make an inspection and in due course report as to the construction that had taken place?

A. I did.

Q. Did you have any discussions at the premises with the Goldblatts concerning it?

A. I may have, I don't remember what they concerned now.

Q. Your presence at the pit, sir, was it in connection with an inspection to see that the fence met the requirements of the ordinance which you were enforcing in your official capacity?

A. That is right.

Q. Was this fence put up in conformity with the ordinance?

Mr. Charles: I object to that, your Honor.

The Court: Sustained.

[fol. 177] Mr. Miller: But he is the enforcement officer, Judge.

The Court: That is a conclusion of law.

Q. After you finished your inspection, when the fence was constructed, did you make any memorandum, note, or report as to the completion of that construction?

A. Yes.

Q. In other words, this was a proceeding under your jurisdiction?

A. It was a proceeding.

Mr. Charles: I object to any proceeding, your Honor.

Q. Was there a file that you had that you were working on? You were working on this, were you not?

A. Yes.

Q. Let us call it a file, for the sake of argument. You had something you were working on. Did there come a time when you ended it, when it was concluded?

A. Yes, there did.

Q. Did you sign your name to that conclusion?

A. I presume I did.

Q. When you signed your name to the conclusion, did you close out that file?

A. Yes.

Q. Do you recall, sir, of your own knowledge, at the time you closed it out, had the file been satisfactorily completed?

Mr. Charles: I object to that.

The Court: Sustained.

Q. Was it completed to your satisfaction?

Mr. Charles: I object to that.

The Court: Sustained.

[fol. 178] Q. Ten years ago when you inspected the construction of the fence at the sand pit, did you ever tell

the defendants that they are required to install a concrete curb 18 inches in depth underneath the fence?

Mr. Charles: I object to that.
The Court: I will allow it.

A. No, I did not.
Q. Were you personally familiar with the fence ordinance of the Township of Hempstead which you were—

Mr. Charles: I object to that.
Mr. Miller: May I ask the question first before the objection, Mr. Charles?

Q. Were you personally familiar with the provisions of the fence ordinance of the Town of Hempstead which you say you were enforcing in this file ten years ago?

Mr. Charles: I will object to that.
The Court: He asks his familiarity with the ordinance. Do you object?
Mr. Charles: I withdraw it.
The Court: Proceed.

A. Yes, I was familiar with it.
Q. To your knowledge, sir, was there any provision in there requiring the erection of a concrete curb in 1949 under a chain-link fence?

Mr. Charles: I object to that. The ordinance speaks for itself.
[fol. 179] The Court: It does.
Mr. Miller: I said if he knows, if your Honor please.
The Court: All right. If you want to ask him whether he knows, I will let him answer it.
Mr. Miller: That is what I said.
The Court: But what the ordinance actually says is what is binding on me, not what he says.
Mr. Miller: That is right, sir, but he was the enforcement officer and I am asking him if he has any knowledge of it.

A. No.
Q. When you say "no," you mean there was no requirement?

Mr. Charles: I object to that. The ordinance speaks for itself.

(The last question was read.)

The Court: You can answer that question.

A. No, there was not.

Q. Prior to the erection of this fence in 1949 did you personally issue a summons with respect to the fence which had existed theretofore?

A. That's right, I did.

Q. Did you appear before Mr. Justice Eckenberg of the District Court in connection with this fence?

Mr. Charles: I object to that.

The Court: Objection sustained. You are moving him [fol. 180] to affirmative defense number 3 again.

Mr. Miller: Oh, no, Judge.

The Court: You go back to the issues that you raised in number two.

Mr. Miller: Judge, under—

The Court: Reread your affirmative defense two.

Mr. Miller: Judge, I am directing these questions with respect to my general denial of paragraph eleventh of the complaint. They say there is a violation in not having a concrete curb. I am questioning him about the time when he as an enforcement officer of the plaintiff in this action—

The Court: When was this ordinance passed?

Mr. Miller: The curb requirement?

The Court: Whatever you have reference to.

Mr. Miller: 1958, I believe. It is the amendment of the 1945 ordinance. The 1945 ordinance had no such requirement.

The Court: Objection sustained.

Q. During the course of your duties with the Town of Hempstead, either as a chief building inspector or manager of the Building Department, whatever the designations were—

A. I was probably designated as manager in '49.

Q. At any time that you were employed by the Town

of Hempstead, did you make any examinations of other sand pits or excavations in the Town of Hempstead?

Mr. Charles: I object to that on the ground it is immaterial.

[fol. 181] The Court: I will allow it.

Mr. Miller: On the second defense, Judge.

A. I did.

Q. What other sand pits did you examine?

A. The operating sand pits at that time were Milburn Sand and Gravel and Nassau Concrete Products. They are both in North Baldwin.

Q. Mr. Young, I show you a series of photographs bound in a volume, Defendants' Exhibit G, and ask you if you would start with the first page, sir, and tell me if you have ever seen the locale pictured in that.

A. I don't recognize—I have been to the Milburn Sand and Gravel pit, I don't know what this is now.

Q. Is that familiar to you, sir?

A. This picture isn't, but I have been to the Milburn Sand pit many times.

Q. Would you turn the page and I ask you if that is familiar to you. Look at photograph No. 2.

A. No, I would not be able to recognize that as the Milburn sand pit.

Q. How about No. 3?

A. No. Vaguely. I wouldn't know what pit it was by looking at it. Generally, they all look the same as this. There is no identification marks here.

Q. Would you look at the next three photographs and tell me if there is anything thereon which would refresh your recollection or enable you to recognize the area shown on the photographs.

A. No, there is not. I want to refresh your memory that, as I said before, I have not been to the Milburn sand and gravel pit in, oh, maybe five or six years.

Q. How about the next photograph, the one with the [fol. 182] hole in the fence?

A. That would certainly not disclose any identity.

Q. And the next photograph with the measuring stick between 7 and 9?

A. No. I couldn't tell what pit it was.

Q. How about the next photograph, the measuring stick at one point one and a half, it looks like.

A. No, there is no identification.

Q. Let me ask you this, sir: Viewing this last photograph that we are just discussing, the one with myself and Mr. Goldblatt in it, can you tell me, assuming this is a photograph of the Milburn pit, sir, what the approximate distance was at the time you visited it from the fence to the commencement of excavation at any point?

Mr. Charles: I object to that.

The Court: Sustained.

Q. The Milburn pit was a dredging operation, was it not?

A. Yes.

Q. The mining of sand and gravel by suction?

A. Yes, it was.

Q. That is the same operation as prevailed at the Goldblatt pit?

A. That is right.

Q. Do you know, sir, the depth or approximate depth of the water at the Milburn pit?

Mr. Charles: I object to that on the ground it is immaterial.

The Court: Same line of objection and same ruling on my part.

You may answer, Mr. Young.

A. I had no occasion at any time to measure the depth. By just hearsay I remember it was 30 feet.

[fol. 183] The Court: Just if you know of your own knowledge.

A. I don't know the depth.

Q. Do you have any knowledge, sir, that sometime recently a man was operating a bulldozer at that pit and the bulldozer went into the lake and he drowned?

Mr. Charles: I object to that.

The Court: Sustained.

Mr. Miller: Judge, it may refresh his recollection as to the depth of the water.

The Court: Sustained.

Mr. Miller: I except.

Q. How many times would you say you have made an inspection of the Milburn pit?

A. Oh, over the years probably personally I was there a dozen or fifteen times, twelve or fifteen times.

Q. Did you at any time on any of those twelve or fifteen visits issue a summons to the owners or operators of the Milburn pit for a violation of Ordinance No. 16 of the Town of Hempstead?

Mr. Charles: I object to that.

The Court: Sustained.

Q. Was the berm at the Milburn pit when you visited it wide enough for you to traverse the entire perimeter inside the fence?

Mr. Charles: I object.

The Court: I will allow it, with your usual objection, my usual ruling, and your usual exception noted.

A. Yes, it was.

[fol. 184] Q. Was that wide enough for an automobile?

A. I would say so.

Q. How wide would you say an automobile is, Mr. Young?

A. Six to eight feet.

Q. Was it wide enough for two cars, one abreast of the other?

A. I would not say so. I would say 10 to 15 feet it was at all times that I saw it.

Q. When you visited the Milburn pit were the slopes stable?

Mr. Charles: Same objection.

The Court: What do you mean by "stable"?

Mr. Miller: Was there stability. I do not want to testify.

Q. Mr. Young, would you be in a position to advise the Court by your testimony what we mean by the phrase a stable slope?

Mr. Charles: I object.

The Court: On the usual ground, irrelevant and immaterial?

Mr. Charles: No, but on his qualifications. He asked Mr. Young if Mr. Young thought he was qualified to tell you.

The Court: In other words, I am to determine whether he is qualified to testify as to what is "stable." On the basis of his past experience he ought to know what is meant by "stable" at this time, so proceed.

A. The term "stable" on the bank of the slope of a sand pit means that the earth or the sand remains in position, it doesn't slide or cave in, and that is known as the angle [fol. 185] of repose, and each material has a different angle of repose.

Q. What was the approximate angle of the Milburn pit at the time you visited it?

A. I would say it was generally around 40 degrees, because that is the angle of repose of sand. There were no cave-in I noticed, so I assume it was 40 degrees.

Q. To your eye it appeared stable, it appeared to be the angle of repose, as you call it?

A. To my eye it was stable, there was no evidence of cave-ins.

Q. Was the excavation on your visits to the Milburn pit below 2 feet above maximum ground water level?

A. Yes.

Q. Was the excavation at the time you visited the Milburn pit more than 10 feet below the established grade without a 2 on 1 side slope?

A. No, I won't go with the last—without, you said?

Q. Let me withdraw the question and take it precisely, sir. I am reading now, Mr. Young, from the complaint in this action, which alleges a violation that the excavation was "more than 10 feet below the established grade of the nearest public street," and at the same time that it was to that extent, and I quote again, "the incline of the side walls is more than 2 horizontal feet to 1 vertical foot and said side walls are not supported by retaining walls." Now I ask you, sir, at the time you inspected or visited the Milburn pit No. 1, were there retaining walls supporting the side slopes?

A. No.

Q. Was the angle of slope which you call the angle of repose of 40 degrees greater on incline than 2 on 1, 2 hori-
[fol. 186] zontal feet on 1 foot?

A. Yes, I would say it was.

Q. And was the excavation more than 10 feet below the established grade of the nearest public street?

A. Yes.

Q. Mr. Young, did you ever inspect the fence around the perimeter of the Milburn pit?

A. Yes, every time I went down there personally.

Q. What type of fence material was that?

A. Chain-link fence.

Q. Do you know the height of it?

A. Yes, 6 foot high.

Q. Was that fence set on a concrete curb?

A. No.

Q. Does the Town of Hempstead own any pits, basins, dumps?

A. Not that I know of.

Q. Mr. Young, do you recall being examined before trial on June 6, 1959, in this action?

A. That's right.

Q. I ask you, sir, if you recall this question and this answer, page 19, line 3:

"Q. Does the Town own any dumps or other cavities aside from drainage sumps? Are there any pits used for dumping operations?

A. Yes, I think they are still dumping at Nassau Concrete Products and also one in Elmont."

Mr. Charles: I object to his impeaching his own witness, your Honor.

Mr. Miller: The man is in the employ of the plaintiff in this action, Judge.

The Court: That is not the point.

Mr. Miller: I am not impeaching him; I am just going to ask him does he recall making that answer.

[fol. 187] The Court: Has he answered this on direct as yet?

Mr. Miller: What?

The Court: Have you asked him questions on this point on direct?

Mr. Miller: I asked him and I am trying to refresh his recollection.

The Court: You asked him with respect to sums, did you not?

Mr. Miller: No, I had said pits or dumps.

The Court: Did you say that?

Mr. Miller: Yes.

The Court: Are you trying to impeach him or refresh his recollection?

Mr. Miller: Refresh his recollection.

The Court: All right, to refresh his recollection I will allow it. To impeach, no. However, if you are impeaching him, if that is sworn testimony, it still can be used to impeach, but you are not using that here.

Mr. Miller: No, he did not make a contrary statement on direct, Judge; he just said he did not recall, and when he said he did not recall—

The Court: You are using his sworn testimony to refresh his recollection?

Mr. Miller: To refresh his recollection, that is right.

Q. Now I ask you, sir, do you recall that question and that answer?

A. Yes, I do.

Q. Does that refresh your recollection to my first—

A. I think the previous one that I just said I don't recall, I think you asked me if I knew the Town of Hempstead [fol. 188] owned any sand pits. I do know they are using some. Whether they completely own them I don't know.

Q. Have you visited these, whether they own them or use them?

A. No, I have not. That is not part of my—

Q. I do not mean now. Have you at any time visited them?

A. No—oh, yes, I am sorry, I did when they were sand pits.

Q. When in point of time was that, Mr. Young?

A. Seven or eight years ago.

Q. Were they fully enclosed with a 6-foot chain-link fence at the time you visited them?

A. Yes. Any sand pit was enclosed with a 6-foot-high fence.

Q. Was that 6-foot fence set on a concrete curb 18 inches in depth?

A. Not that I remember, no.

Mr. Miller: No further questions.

Mr. Charles: No cross.

(The witness was excused.)

The Court: Have you any other witnesses available right now?

Mr. Miller: Mr. Morhous is here.

JOHN A. MORHOUS, residing at 134 Park Boulevard, Malverne, New York, called as a witness by the defendants, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Morhous, would you state your occupation for the record?

A. I am the Town Attorney of the Town of Hempstead. [fol. 189] Q. How long have you served in that capacity?

A. Since April, 1953.

Q. Are you familiar with the pleadings in this action?

A. Very generally, Mr. Miller.

Q. Are you familiar with the previous lawsuits that have been had where the pleadings were subscribed by you between the Town of Hempstead and the owners of this pit?

A. Generally.

Q. Is it the function of the office of Town Attorney to bring proceedings for the alleged violations of the ordinances of the township?

A. It is.

Q. Are you familiar with the proceedings brought by the Town of Hempstead with respect to Ordinance No. 16, either personally, or have you caused an investigation to be made of your files?

A. I have done the latter.

Q. As a result of that investigation, then, are you in a position to state what proceedings have been brought by your office with respect to Ordinance No. 16?

Mr. Charles: As to other sand pits?

Mr. Miller: As to any place, including ours.

The Court: Sustained.

Q. Are you familiar with Section 10 of the ordinance, Mr. Morhous?

A. I would have to refresh my—

Q. Which reads, and I just want one phrase I am picking out, "shall be guilty of a misdemeanor." Do you know that provision of Section 10?

A. I would have to refresh my recollection.

Q. I show you a copy of Oridnance No. 16 and ask you if you would just look at that one phrase in Section 10. [fol. 190] A. The ordinance contains that provision.

Q. Now I ask you, sir, if at any time while you were the Town Attorney, as a result of the investigation you made of the records of your office, has the Town Attorney's Office maintained a criminal proceeding under Section 10 of Ordinance No. 16 against the County of Nassau with respect to violation of Ordinance 16?

Mr. Charles: I object to that.

The Court: Sustained.

Q. Do you have any knowledge as to whether any proceeding under Section 10 of Ordinance No. 16 has ever been brought by your office with respect to any other sand pit privately owned within the Town of Hempstead?

Mr. Charles: Same objection.

The Court: I will allow it with that usual reason I gave you yesterday and also this morning.

Mr. Miller: May I state for the record, Judge, that this line of questioning is with respect to the second affirmative defense and principally unjust discrimination on the constitutional ground.

The Court: I know that. As a matter of fact, I helped you along on that by bringing your attention to the equal protection clause of the United States Constitution.

Mr. Miller: That is correct, sir.

(The last question was read.)

A. Not of my own personal knowledge, Mr. Miller, but if I can refresh my recollection from my files, I can give you that information.

[fol. 191] Q. Surely.

The Court: While Mr. Morhous is looking at his files, I know there is a lot of law under the equal protection clause, a lot of case law, and I assume you will find a case or two to sustain your position, you will submit them, anyway, for my consideration, Mr. Miller.

Mr. Miller: I shall, sir.

A. You are interested, Mr. Miller, only in prosecutions under this particular ordinance.

The Court: You mean injunction suits, do you not?

Mr. Miller: The first question I asked was any criminal proceedings.

The Court: Did you object to criminal proceedings?

Mr. Charles: That is right.

The Court: Sustained. I misunderstood.

Q. Has the Town Attorney's office at any time against a private individual commenced an action for an injunction with respect to the enforcement of the provisions of Ordinance No. 16?

Mr. Charles: I object to that.

The Court: I will allow that for the general reason I have been giving right along.

A. Let me refer to my files again, Mr. Miller.

I find no such actions.

Q. Do you know of your own knowledge, sir, whether or not the westerly side of Wantagh Avenue approximately [fol. 192] 900 feet north of Hempstead Turnpike is located within the Town of Hempstead?

A. That is south of Old Country Road?

Q. Yes, south of Old Country Road; as a point of orientation, Mr. Morhous, this is approximately directly across the street from an old abandoned sand pit on the easterly side of Wantagh Avenue.

A. Yes, I believe it is within the town.

Q. I show you, Mr. Morhous, a photograph in this multiple exhibit (referring to Defendants' Exhibit G) which is the fifth one from the end. Do you have that, sir?

A. I do.

Q. That is the point of reference which you just answered is located within the confines of the Town of Hempstead?

A. Yes.

Q. Now I ask you, sir, if you have any personal recollection or any files which would refresh your recollection as to whether or not your department ever brought an injunctive action against the County of Nassau with respect to the maintenance of the property shown on that photograph.

Mr. Charles: I object.

The Court: I will allow it; against the County of Nassau.

A. No such action has been brought.

Q. Would your files indicate or would you have any personal recollection as to whether or not any proceeding was brought against any person, firm or corporation prior to acquisition of title of that basin by the County of Nassau?

A. There is no record in my files of any such action.

Q. To your knowledge, Mr. Morhous, are there any sand [fol. 193] pits other than the Goldblatt sand pit now operating in the Town of Hempstead?

Mr. Charles: I object to that.

The Court: What was the question again?

(The last question was read.)

The Court: I will allow it.

A. Not to my knowledge, Mr. Miller.

Q. May I ask in what period of time you searched the records of your office which you say you had done?

A. I went back about twenty years.

Q. On Ordinance No. 16, Mr. Morhous, there is a legend that it was adopted on December 18, 1945. Do you recall that, sir?

A. Yes.

Q. The next to the last paragraph of the ordinance repeals Article XVII of the Building Code, do you recall that?

A. No, I don't.

Q. I show you this ordinance, sir.

A. Yes, I see that that is so.

Q. Now I ask you, sir, for this period of time which you have searched the files of your office did you find any injunctive actions, actions for an injunction, permanent or temporary, with respect to the enforcement of Ordinance No. 16; or prior to December 18, 1945 an action for an injunction for the enforcement of Article XVII of the Building Code?

The Court: XVII?

Mr. Miller: It is the predecessor of this one, Judge.

The Court: Sustained. I am giving you a great deal of latitude, Mr. Miller. Every once in a while I have [fol. 194] to sustain the objection right on the record.

Q. Let me ask you this, sir: Do the records of your office indicate the commencement of an action for an injunction against any person, firm or corporation, or entity, for the enforcement of Ordinance No. 16, except as against the defendants in this action?

Mr. Charles: I object to that.

The Court: I will allow it.

A. No, there is no record of any such action.

The Court: This is all on your theory of a violation of the equal protection clause of the United States Constitution.

Mr. Miller: And also the Constitution of the State of New York as to unjust discrimination in the enforcement of the ordinance, Article I, Section 11, I believe it is.

The Court: What subsection?

Mr. Miller: I do not know, Judge. I will be glad to brief it, sir.

That is all.

Mr. Charles: I have no cross.

(The witness was excused.)

The Court: Do you want to start any more witnesses, Mr. Miller?

Mr. Miller: I do not think we have any more now. I would like to suspend for lunch if we may at this point.

The Court: Let us recess for lunch.

[fol. 195]

EXCERPTS FROM EXAMINATION BEFORE TRIAL OF FREDERICK C. OTT

Afternoon Session

(The reel of movie film, previously exhibited to the Court, was received in evidence and marked Defendants' Exhibit H.)

Mr. Miller: If your Honor please, I would like at this time to read into the record certain portions of the examinations before trial of the various witnesses of the plaintiff in this action. Would your Honor want the originals of all of these to follow any of these along?

The Court: No.

Mr. Miller: The examination of Mr. Ott, on page 21, left-hand pagination, line 24:

"Q. Now, in connection with your activities there on that day"—may I interpose, "there" refers to the subject property—"and/or subsequent to it, can you tell me, please, by whom you were retained for these services?

A. By the Nassau County Department of Public Works."

COLLOQUY

Mr. Charles: I move to strike it out on the ground it is part of the third defense.

The Court: What is the relevancy of that? By the way, you have already asked questions of Mr. Ott, anyway.

Mr. Miller: I realize that, sir. The purpose of this is on a question of credibility of Town officials.

The Court: No, then you cannot. You can only read E. B. T.'s on the question of credibility when the witness

[fol. 196] is on the stand. That is his own testimony you are reading; Mr. Ott has already been a witness.

Mr. Miller: That is right, and he testified exactly the same on the stand here. What I want to put in the record is the statement that he made as to who he was retained by, and a statement by another witness who says another statement in connection with a retainer.

The Court: No, if it is only for the purpose of impeachment, the objection is sustained.

Mr. Miller: Then I am afraid we will have to have the Supervisor in.

The Court Where is he?

Mr. Miller: After we finish with these readings.

The Court: What are you going to establish by the Supervisor?

Mr. Miller: A serious question of credibility, Judge. The Presiding Supervisor says that he retained Mr. Ott. Mr. Ott and Mr. Merklin and everybody else say the Department of Public Works of the County retained Mr. Ott.

The Court: I rule that that is a collateral issue in this case; since it is a collateral issue, you cannot contradict him by other evidence.

Mr. Miller: I respectfully except.

The Court: For the purpose of impeachment you have brought in a collateral matter and on the collateral matter you are bound by the testimony of the witness.

[fol. 197] Mr. Miller: Where the witness is the Presiding Supervisor of the plaintiff in this action?

The Court: The witness here was Mr. Ott.

Mr. Miller: I am not impeaching him: I am happy with his testimony; that testimony is correct. I am impeaching the testimony before trial of the Presiding Supervisor of the plaintiff.

The Court: There has been no supervisor testifying here, so you cannot impeach a witness who has not appeared.

Mr. Miller: That testimony is what I am about to read into the record, if your Honor please, and your Honor is ruling that I would have to produce the witness first, if I understand your ruling.

The Court: I thought I knew the rules of evidence until this moment. Now I am confused. You want to impeach a witness who has not as yet testified in this trial?

Mr. Miller: It is my understanding, and I would bow with deference to the Court's ruling if I am incorrect, that at a trial either side may read any part or offer all of an examination before trial actually taken and sworn to prior to the commencement of the trial, regardless of whether the person examined before trial appears as a witness at the trial or not.

The Court: There is no such loose rule as that.

Mr. Miller: Subject only to the right of objection of op-
[fol. 198] posing counsel as to the relevancy or proper necessity of the questions as posed.

The Court: There is no such rule as that, Mr. Miller.

Mr. Miller: Is your Honor ruling that I have no right to read from the examinations if the witnesses have not been here at the trial.

The Court: I am not saying that at all. What is your theory of offering this in evidence?

Mr. Miller: My theory is on the question of credibility of the Presiding Supervisor of the Township who has given sworn testimony in the examination—

The Court: How can you impeach the credibility of a witness who has not appeared to testify at this trial?

Mr. Miller: He has testified at an examination before trial which is sworn testimony, and unless your Honor rules that the question asked at the examination was improper, then it may be read into the record at this trial.

The Court: Mr. Miller, all I can say to you is, if you have the right to read this examination before trial of the Supervisor, then you read the examination before trial of the Supervisor, and any cross examination, if this testimony can be read at this time, should have taken place at the examination before trial. You cannot offer evidence on a collateral matter to impeach him on a collateral matter.

Mr. Miller: If your Honor please, I do not quite follow—
[fol. 199] The Court: Mr. Miller, you cannot impeach a witness in this court until that witness has first testified.

Mr. Miller: Then I except to your Honor's ruling.

The Court: You have the right to take an exception.

Mr. Miller: And I would like to have the record indicate that I respectfully except to the ruling that it is a collateral issue, because the issue concerns the services of Mr. Ott

which are Plaintiff's Exhibits 1 and 2 in evidence concerning the subject matter in the complaint.

The Court: Am I making myself clear? A witness takes the stand, and only after he takes the stand have you the right to impeach his credibility. If you, under the three or four different methods by which you can use an examination before trial, want to impeach his credibility, you can do so only at that examination before trial, that is all.

At any rate, Mr. Miller, the point is this: You cannot impeach a witness who has not even testified at this trial. That is the basic ruling.

Mr. Miller: Judge, when we use the term "impeachment," of course that is a loose phrase, because—

The Court: Not to me it is not.

Mr. Miller: To this extent, Judge: I did not say I wanted to impeach him. I wanted to point out in the record on a point of credibility simply what one witness has said and what another witness has said. The weight and suffi- [fol. 200] ciency of the various items are for your Honor's determination as to whether there is materiality, whether it is a collateral issue, or a direct issue. That I would certainly admit to.

The Court: Let us move on, Mr. Miller.

Excerpts From Examination Before Trial of Edward P. Larkin

Mr. Miller: Examination of Mr. Larkin, direct, page 79, line 19:

"Q. And to your knowledge has the Township of Hempstead ever brought a criminal or civil proceeding pursuant to its ordinance which is attached to the complaint in this action, directed against the County of Nassau to enforce the said ordinance?"

Mr. Charles: I object to that on the ground it is immaterial.

The Court: How did I rule this morning on that similar question?

Mr. Charles: You sustained it.

Mr. Miller: You sustained it on the criminal but allowed it on the civil.

The Court: I sustained on the criminal and allowed on the civil. I will do the same thing now, for the same reasons. That is the line of questions, too, you asked Mr. Morhous, is it not?

Mr. Miller: Yes. Your Honor sustained the objection on the criminal but permitted it on the civil.

The Court: That is right.

Mr. Miller: May I read the answer with respect to the civil?

[fol. 201] The Court: I am very liberal in that respect.

Mr. Miller: May I read the answer now with respect to the civil portion?

The Court: You may.

Mr. Miller: (Reading:)

"A. No."

Mr. Larkin, direct examination, page 83, line 4:

"Q. Have you ever seen Lee Lake?
"A. Oh, yes."

Mr. Charles: I move to strike that out on the same grounds as this morning.

The Court: As to whether he has ever seen Lee Lake? I will let him read it as to whether Mr. Larkin saw Lee Lake or not.

Mr. Miller: (Reading:)

"Q. And do you know the size of it?
"A. Well, it might be roughly 1,000 feet long by 100 feet wide, perhaps."

The Court: All right, I am ruling the same way again. I am letting it in with your objection and your exception.

Mr. Miller: (Reading:)

"Q. And do you know the approximate depth of the water in that lake?
"A. Well, I don't but it varies, I don't think it is more than 3 or 4 feet deep in some spots, it is not actually a lake, it is more like a basin.

[fol. 202] "Q. Does the Township of Hempstead have any drainage facilities into this Lee Lake?

"A. Yes, they do, they have an easement down the middle of it.

"Q. And do they drain storm water from adjacent streets running down into it?

"A. Yes, they do.

"Q. And is it correct, sir, or do you have any knowledge as to whether a three-year-old child drowned there several years ago?

"A. Yes, she did.

"Q. And when was the last time that you personally saw Lee Lake?

"A. Oh, I think that was about last November or December.

"Q. And at the time you saw it, sir, was it enclosed with a 6-foot-high chain-link fence?

"A. You mean was there a closure?

"Q. Was Lee Lake enclosed with a 6-foot-high chain-link fence?

"A. Well, I don't understand your question. In some places it was, and in some place it wasn't.

"Q. All right, then let me put the question this way: Was Lee Lake, the area you are talking about, the area which you said is perhaps 100 feet wide and 1,000 feet long—I am not being too particular about the distance, but that particular area—at the time you last saw it, that particular area, was it fully enclosed?

"A. No."

Line 24:

"Q. Is Lee Lake owned by the Township of Hempstead?

"A. No, sir."

[fol. 203] Page 85, line 1:

"Q. Private property?

"A. Yes, sir.

"Q. Has the Township of Hempstead ever brought any criminal or civil proceedings with respect to Lee Lake and in particular the Ordinance No. 16 of the Town of Hempstead as amended?"

Mr. Charles: Same objection.

The Court: Same ruling.

Mr. Miller: And I will read the answer only with respect to the civil and not to the criminal, because the objection was sustained as to the criminal.

(Reading:)

"A. Not to my knowledge."

The Court: Remember, now, you still have to show me the materiality of all this in your brief.

Mr. Miller: Yes, sir.

The Court: Even though I am allowing it in evidence now.

Mr. Miller: Yes, sir.

Line 8 on page 85:

"Q. Do you know how close the dredging excavation commenced with respect to the property line of this Lee Lake? I presume there is a line around it.

"A. Yes.

"Q. There is water and then there is land around the water, is that correct?

"A. Yes.

"Q. And beyond that land, whatever width it is, there is property owned by other persons?

"A. That's right, it is almost entirely surrounded by the [fol. 204] back yards of houses.

"Q. That was my impression. Now, what are the distances between the property line of the other persons, the non-owners of Lee Lake, and the edge of the dredging or excavation of Lee Lake?

"A. Oh, it varies, in some places it is 100, and in some places it is 70.

"Mr. Charles: Seventy feet or 100 feet?

"The Witness: Yes, 70 by 100, and in some places it is less than 20."

Line 10, page 86:

Mr. Charles: Why don't you finish the answer?

Mr. Miller: Mr. Charles, you can read anything you want in the examination.

Mr. Charles: I do not think you ought to stop in the answer.

The Court: I will let you read and even repeat questions if you think his reading is not complete enough.

Mr. Miller: Page 86, line 10:

"Q. I believe you stated before that this basin was partially enclosed. Do you know what type of enclosure?

"A. Well, there are all kinds of enclosures. For instance, there are stockade fences, there are cyclone fences, there are rail fences. For the most part the lake is surrounded by houses and their back yards run down to it."

COLLOQUY

The Court: Forgive me for interrupting, Mr. Miller, but [fol. 205] you have developed a lot of this same evidence through other witnesses so far, have you not?

Mr. Miller: Judge, this goes to some of the materiality of the photographs which we have put in. They show a continuity, especially the photographs in connection with Lee Lake.

The Court: Go ahead.

Mr. Miller: It is also on the question of the second affirmative defense with the point which we are raising as to unfair discrimination, unconstitutional discrimination; the knowledge of the Town officials as to the existence of other areas which violate the same ordinance.

The Court: All I said when I caused you to give me all this long explanation was that I thought you had developed this same set of facts through other witnesses.

Mr. Miller: I am sorry, sir.

The Court: If you have not, you go ahead.

Mr. Miller: I thought you were asking for an explanation, that is why I gave it. I am sorry, sir.

The Court: I just thought it was repetitive, that was all.

Mr. Miller: The examination of Mr. Herberger, please.

Mr. Charles: May I finish reading from the Larkin exam?

The Court: No, after he reads, you can read. I usually like to follow the practice of a man finishing all his reading first and then your reading in your turn what you think is [fol. 206] pertinent, and if necessary, you can reread the

parts that he has read so there is continuity so far as your questions and answers are concerned.

Mr. Charles: Very well, sir.

EXCERPTS FROM EXAMINATION BEFORE TRIAL OF MR. HERBERGER

Mr. Miller: Mr. Herberger, page 35. He is the Town Engineer. Line 12:

"Q. Do you know of your own knowledge whether the Town of Hempstead owns any sand pits or other basins or excavations or sumps or drainage pits in the Town of Hempstead?"

Mr. Charles: Same objection.

Mr. Miller: (Reading:)

"A. Yes, they do.

"Q. Do you know how many?

"A. I wouldn't know the exact number.

"Q. Approximately?

"A. Of which category?

"Q. Split them up any way that you know that they are. Are there any sand pits which they own or former sand pits?

"A. When you say the Town, you also mean maybe a refuse district of the Town?

"Q. Yes, any Town subdivision municipal district.

"A. Maybe in the neighborhood of four or five.

"Q. Do you have any idea, roughly, of approximately how deep these are below established grade?

"A. On the rubbish dumps they are all filled but one and that is below grade, depending on which street you are talking about, maybe 10, 15 feet.

[fol. 207] "Q. And is that rubbish dump fenced in?

"A. On three sides and part of the fourth, and the fence on the fourth side I think the children have destroyed to a certain extent.

"Q. What type of fence is that?

"A. A chain-link fence.

"Q. And how high is it?
"A. I would say 6 feet.
"Q. Is that fence imbedded in a concrete curb?
"A. No, it isn't.
"Q. 18 inches in depth?
"A. No."

The Court: Excuse me, which property is this, please?
Mr. Miller: This is a rubbish dump owned by the Town of Hempstead, located within the Town of Hempstead.

Line 18:

"Q. And would you say that rubbish dump—did you call it?
"A. Rubbish dump, yes.
"Q. —rubbish dump has more than 75 cubic feet of earth removed?
"A. Yes."

Page 37—if your Honor please, there are only a few questions here that are slightly repetitive of Lee Lake, but it is only half a page and in continuity I will read it.

Page 5:

"Q. Do you have any knowledge of what is called the 800 feet Lee Lake, the Town drainage basin in the vicinity of Woodmere Park?
"A. I have knowledge of what we call Lee Lake, but it is [fol. 208] not owned by the Town.
"Q. Does the Town drain waters into that lake?
"A. Yes.
"Q. That is an artificial basin, isn't it?
"A. At least in part.
"Q. And the Town drains into it?
"A. That's right.
"Q. Is that fenced in with a chain-link storm fence?
"A. No.
"Q. Is there any fence at all around it, to your knowledge?
"A. I believe there is.
"Q. And what would that be made of, do you know?

"A. I think it is a snow fence and possibly some chain-link fence.

"Q. When you say a snow fence, that is what we see along the highway, those little slats?

"A. Correct."

Excerpts From Examination Before Trial of Mr. Merklin

One other, Mr. Merklin, page 107, line 2:

"Q. And what is the accepted practice of the Department"—referring to the Department of Public Works—"with respect to the degree of slope?"

This refers to a side wall of an excavation, Judge.

"A. A slope of 1 on 2."

Now, Mr. Charles, can we agree that 1 on 2 would be a 60-degree declining angle, or shall I recall Mr. Goldblatt to give testimony on that? I think we can stipulate on this, Judge.

Colloquy

The Court: 2 on 1 is what?

[fol. 209] Mr. Miller: 2 on 1 is 30; 1 on 1 is 45; and a 1 on 2 is 60.

Mr. Charles: A 1 foot vertical by 2 foot horizontal is 1 on 2.

Mr. Miller: It is very gratuitous of Mr. Charles to say what the witness means. The witness is very clear and he is a professional man, 1 on 2, and that is a professional phrase, 1 on 2.

The Court: Does it say 1 on 2?

Mr. Miller: It says 1 on 2.

The Court: Then just read what it says there, and then that is the way I will interpret it, 1 on 2.

Mr. Miller: Right, 1 on 2. Can we agree that 1 on 2 is equal to 60 degrees, or shall I call a witness?

Mr. Charles: We can agree that 1 on 2 would be 60 degrees.

Mr. Miller: 60 degrees declining angle. Thank you. You may read.

Mr. Charles: I am reading from page 86, line 2, of the examination of Edward P. Larkin: "There is a fairly substantial amount of land, I'd say for the most part of the shoreline there are from 60 to 100 feet, and that is pure recollection from looking at the charts. But for the most part of the shoreline there is substantial land between the property lines and the existing water lines."

The Court: Before you read further, this has to do with what property, Mr. Charles?

Mr. Charles: Lee Lake, sir.

The Court: Not the subject property.

Mr. Charles: That is right.

[fol. 210] EXCERPTS FROM EXAMINATION BEFORE TRIAL OF EDWARD P. LARKIN READ INTO RECORD

I am reading from page 96 of the examination of Mr. Larkin, at line 22:

"Q. What other excavations does the Town own?

"A. Well, we own a—do you want me to characterize them?

"Q. Well, I would appreciate it if you would tell me what they are as to function—in other words, is it a pond or a hole or is it a dump—and tell me where it is situated and the size of it and anything you know about it.

"A. Well, we own an 11-acre pit that was formerly a sand pit on Averell Boulevard.

"Q. In what town is that?

"A. In Elmont. We own one on Freeman Avenue off Elmont Road. We have one at Pennsylvania Avenue in Roosevelt. We have one on Coes Neck Road, in Baldwin. We have one I believe in Wantagh. We may have more, but those are just some that come to my mind.

"Q. Now, are these excavations or are some of them filled with water?

"A. No, they were but they are all filled in.

"Q. Are they all level with grade?

"A. What grade?

"Q. I mean if you look at it today, if you were standing

there, would it look like a hole or would it look like the same earth that you were standing on?

"A. You know, you are going to think I am quibbling with you, but I am not. I can't really answer that question yes or no. If you stand on Averell Boulevard you are on [fol. 211] grade. If you stand on the back of it, you are about 90 feet above grade.

"Q. I am not taking the scientific meaning of the term of 'on grade.' My question is this: If you were facing, if you were standing on top of the adjoining to this thing and looking at it, would you look into a hole or would you be looking at fairly level ground?

"A. If you looked out from one end you would look into a hole.

"Q. How deep would that hole be?

"A. Oh, it might be 30 to 40 feet.

"Mr. Charles: Well, if you looked at it from the street level, it is level with the street, isn't it?

"The Witness: At one side.

"Mr. Charles: At one side?

"The Witness: Yes.

"Mr. Charles: And there is no water in it.

"The Witness: No water in it.

"Mr. Charles: But as you go back where there formerly was a hill, that hill is still there?

"The Witness: Right, that's right.

"Mr. Charles: But the entire plot is level with the street.

"The Witness: That's right.

"Mr. Charles: And in some instances are now being used as Little League ball parks?

"The Witness: That's right."

The Court: Have you finished your reading monologue, Mr. Charles?

[fol. 212] COLLOQUY

Mr. Charles: I have, sir.

The Court: Have you finished your reading, Mr. Miller?

Mr. Miller: I have finished my reading, if the Court please.

The Court: Now what is next on the program.

Mr. Miller: If the Court please, I have refrained from reading from five or six examinations before trial which I have conducted in this proceeding in line with your Honor's original ruling with respect to the holding back of evidence in connection with the third separate defense, but I wish the record to indicate that I am prepared with an offer of proof, had your Honor's ruling been the other way, to offer evidence by examination before trial and by written documents, principally maps and surveys prepared by the Town of Hempstead Engineering Department, which would show, one, the desire to acquire the real property which is owned by the defendants—

The Court: Wait, you already have my ruling. I have dismissed your affirmative defense three. There is no sense in making an offer of proof at this time.

Mr. Miller: I except again to your Honor's ruling on the record, and I ask your Honor if you would so rule or would rule similarly if I made an offer of proof under the second complete defense and counterclaim with substantially the same proof in connection with the attempts to [fol. 213] permanently restrict the beneficial use of the property so as to be tantamount to a confiscation thereof.

The Court: I will not make any such ruling, no. If you have any evidence to offer under affirmative defense number two, you make your formal offer each time in the proper way. To be blunt, I cannot rule on vagueness.

Excerpts From Examination Before Trial of Mr. Herberger Read Into Record

Mr. Miller: If the Court please, I shall now read into the record examination before trial of Mr. Herberger, the Engineer of the Town of Hempstead, page 40, line 20:

"Q. Do you have those surveys or maps here with you?
"A. No, I don't.
"Q. Do you know how many there are?
"A. How many surveys?
"Q. Yes.
"A. I think we roughed out maybe two or three different surveys to bringing the water here or using the Goldblatt pit, alternate ways of dismissing of the water."

Mr. Charles: Now I move to strike that from the record.

The Court: How is that relative to your affirmative defense number two?

Mr. Miller: Affirmative defense number two, if your Honor please, aside from the allegations that the ordinance is invalid, confiscatory, void and discriminatory, also states that its application would deprive the defendant Goldblatt of the lawful use of his property without due process of [fol. 214] law, and further that application to the premises permanently restricts the beneficial use thereof so as to amount to a confiscation of his property rights without just compensation. It is our position at this point, if your Honor pleases, that the maps which they have drawn for the appropriation and acquisition bear materially on that second defense in so far as any intention to acquire for drainage purposes this property, because if they were to drain into the pit they would confiscate the beneficial use of the pit and deprive us of our lawful business.

The Court: I am reading your paragraph sixth, it is here before me, and I rule that your proposed evidence is irrelevant and immaterial under paragraph sixth of your affirmative defense number two.

Mr. Miller: In connection with the general clauses of the answer which deny the material allegations of the complaint, principally the denials pleaded in paragraphs first and second of the answer, they would incorporate, if your Honor please, a denial to the general allegation that the Town has no adequate remedy at law as alleged in both causes of action of the complaint; and with respect to that allegation of the complaint and the denials as pleaded in the answer, I offer in evidence a series of maps prepared by Mr. Herberger, the Town Engineer, with reference to the subject property and adjacent properties, and the basis of the offer is that there is an adequate remedy at law by [fol. 215] virtue of the impending condemnation proceeding and acquisition of this property.

Mr. Charles: I object to it.

The Court: Objection sustained.

Mr. Miller: Exception.

The Court: For your protection, do you want those maps marked for identification?

Mr. Miller: They are not specified in there because in the examination before trial he just said, "I will produce them and attach them to the examination." We could do this when we suspend, Judge; we could count them up and take the legend off of each one and mark them for identification, if your Honor does not want to take the time now.

The Court: I have plenty of time now, but I think in all fairness to you they should be marked for identification.

Mr. Miller: Yes.

The Court: I want to protect you as much as I want to protect the other party.

Mr. Miller: For the record, the maps which I offered into evidence, I will read the legends of them.

Mr. Charles: Sought to offer into evidence.

Mr. Miller: No, which I offered and which were denied by the Court.

The Court: That is right, he offered them.

Mr. Miller: I offered them.

The Court: And I did not let them in.

Mr. Miller: That is right.

[fol. 216] The Court: Suppose you take all the maps and just mark them as one exhibit.

Mr. Miller: I was just going to read the legend on each one.

The Court; That is not necessary.

Mr. Miller: All right. There is a series of twelve maps which have been supplied to me as part of the examination before trial of Arthur Herberger, the Town Engineer of the Town of Hempstead.

The Court: Staple them together and mark them as an exhibit for identification.

(Marked Defendants' Exhibit J for Identification.)

DEFENDANTS REST

Mr. Miller: The defense rests, if your Honor please, and I would ask the indulgence of the Court to have reasonable opportunity to make an extended motion to dismiss. I am ready at any time the Court is ready to hear me.

The Court: Why don't you give me briefs?

Mr. Miller: I would like a motion on the record if I may have it.

The Court: All right, make your motion on the record.

Mr. Miller: Both sides having rested, if your Honor please, the defendant respectfully moves—

The Court: Have you rested, Mr. Charles?

Mr. Miller: They rested before I started, unless he is going to request rebuttal. Let me sit down.

The Court: He might have rebuttal.

[fol. 217] Mr. Miller: Yes.

Mr. Charles: May I have a couple of minutes for a consultation?

The Court: Surely.

(A recess was taken.)

The Court: Mr. Charles, are you producing any more evidence now?

PLAINTIFF RESTS

Mr. Charles: No, sir. The plaintiff rests.

Mr. Miller: Both sides rest, if your Honor please, and at this time I respectfully ask the indulgence of the Court for a motion to dismiss on the record.

The Court: Yes.

MOTION TO DISMISS

Mr. Miller: If it please the Court, I will address myself first to a motion to dismiss the second cause of action in the complaint herein. After reiterating the standard allegations as to corporate existence, etc., the gravamen of the second cause of action—I will take them seriatim—is five subdivisions principally of the ordinance. Number one is that at various locations the pit excavation commences within 20 feet from the adjoining property line. I respectfully point out to the Court that the prior ordinance which was admitted in the notice to admit specified that a 10-foot berm or width would apply in such excavations. When they changed this ordinance, therefore, from 10 to 20 feet, at most we became nonconforming to it on the basic law of nonconforming use, which I respectfully submit I will have in my brief.

The Town has utterly failed to show any danger either to [fol. 218] the public or to the community at large or to anyone if the berm were 10 feet. The answer is quite obvious as to why they could not show any danger, because Mr. Merklin testified that the county specification for sumps is only 11 feet. We have an exhibit in evidence of a pit on Wantagh Avenue where it is only 5 feet, and yet there is a good angle of repose and a stable bank.

The question then presents itself as to whether or not the requirement of a 20-foot berm is a reasonable regulation. We are dealing with a regulatory ordinance. If the ordinance which is regulatory in nature is unreasonable by its terms or in its application, or if as applied to the instant property it is tantamount to confiscation of our property rights, then it is unconstitutional under our second defense as pleaded and should be stricken.

The second point in paragraph eleventh of the complaint is that we are excavating at a depth greater than 10 feet below grade and not maintaining a 2 on 1 incline. Just briefly, as we had in the trial itself, a 2 on 1 incline is a 30-degree declining angle, as opposed to a 1 on 1 which is a 45-degree angle, as opposed to a 1 on 2, which we agreed was a 60-degree declining angle.

Mr. Goldblatt testified that the pit was below 10 feet below grade in 1927; the very first ordinance of any kind of this township was 1930; therefore, our excavation antedates any ordinance of any kind, zoning or regulatory of any nature, by three years, also bearing in mind that we have [fol. 219] already adjudicated our right to mine sand and gravel and process same on the premises under the first separate affirmative defense, the judgment of which is before your Honor.

The minutes of the first trial before Mr. Justice Hill specify that the lake was 30 feet deep in 1927. Here again we have an unreasonable regulation and an attempt to modify or nullify a judgment of this court rendered by Mr. Justice Hill which gave us a valid vested nonconforming use with respect to our right to mine valuable properties of sand and gravel from this property. In effect, I submit to the Court that Judge Hill said, "Go on home and dig to your heart's content. As long as you don't do any-

thing which is wrong, as long as you don't create a hazard, as long as they cannot come in and show that what you are doing is detrimental to life and limb and property, then just go home and dig." I am, of course, paraphrasing, obviously.

The ordinance is unreasonable in its terms when it embodies a 2 on 1 slope, for the simple reason, first, that it immediately reduced the requirement of a 45-degree angle to a 30-degree angle. The ordinance attached to the complaint reads a 2 on 1. The predecessor, that is, before this ordinance was amended in 1958, one year ago, the original ordinance of 1945, Ordinance No. 16, read—and it is in the notice to admit—a 45-degree angle, and we are maintaining a 45-degree angle, of which your Honor has had testimony [fol. 220] that that is an angle of repose, that it is stable, that in thirty-two years of mining there has never been a cave-in of a bank.

Therefore, I submit that the Town has wholly failed to prove in any respect that the maintenance of a 45-degree angle on our banks constitutes a hazard or a dangerous condition or anything which would require or compel the application of the doctrines of equity in this court on the principle of irreparable injury. There is obviously no danger there, there has never been any danger in thirty-two years of digging at that place. You have had expert witnesses here, employees of the Town and County, who testified that there is an angle of repose and the banks are stable at that angle of slope that exists.

Now with respect to the fence, if your Honor pleases, that is the next item specified. We have a fence, we have complied with the fence ordinance. In the notice to admit your Honor has in front of him the original ordinance of 1934 which required that excavations and other cavities should be fenced in, and I do not have any quarrel with that ordinance whatsoever; it is a very reasonable, proper regulation. The people who have children are entitled to have open excavations fenced.

But they come along in 1958 and say, "Yes, you spent $20,000 in 1949 to put up a fence and everything was fine and dandy, and we approved it and we inspected it." Mr. Young said he was there and he closed out his file on it, and

[fol. 221] he was the chief building inspector. "But now we want you to lift up the fence and put a concrete curb under it, in 1958."

There again, if your Honor please, number one, we are nonconforming as to the later change in an amended ordinance; number two, the requirement of putting in the concrete curb at this time is prohibitive in cost and there has been no testimony adduced that it is necessary. The most they found was that in 7,000 lineal feet of fence there were at two places small 10- or 11-inch high depressions by maybe 20 or 24 inches wide, with a gradual slope on each side of the hole. I think your Honor got tl at question very clearly on the testimony of Mr. Ott with respect to those pictures as to size and dimension. If your Honor will recall, we measured his shoulders so as to see how we would get through there.

Compared with this, we have adduced to your Honor a picture in a similar pit which used to be an operating sand pit, wherein the hole in the fence was so big that we walked in one next to the other, at the Milburn pit. It is in the volume of pictures. That, I say to your Honor, is a hole in a fence; that is not a slight depression under a fence.

We have the testimony of Mr. Goldblatt, which is completely unrefuted, that it is part and parcel of his operation to maintain a proper inspection of his property; that from time to time if they find a hole or depression or declivity it is filled; and that there is never a dangerous condition [fol. 222] existing. I submit it is almost a matter of law that if in 7,000 feet of fence all they could find were those two slight depressions, that is a pretty safe operation, especially when they reinspected and found nothing. So, evidently, they have come to the conclusion themselves, as we know the truth to be, that this is always inspected, and there is no danger lurking in the community.

The plaintiff has failed to show that there is a need for a curb or any possible present danger, and I respectfully contrast to the Court the maintenance of this large sump in Levittown on Hempstead Turnpike west of Division Avenue, which is filled with water, and you have had testimony it has always been filled with water, and as I think Mr. Merklin or Mr. Young said, you do sometimes hit below

the maximum ground water and those pits will always have water in them, and that sump has no concrete curb on it. Therefore, on a question of unjust discrimination on constitutional grounds, how in the world can they come along and try to assess a requirement of lifting up the whole fence and throwing a curb under it as to our property, the only one they ever bring actions against, when the County and Town properties themselves, and some containing water, some without water, have in no way been remedied? I submit that your Honor can take it almost as a matter of law from their own failure to remedy their pits by putting the concrete under it that they do not think it is necessary [fol. 223] enough for the safety of life and limb to the people living in the area of those pits.

The next allegation in the complaint is that the pit has been excavated substantially beyond points 2 feet above the maximum ground water level at the site. I respectfully point out to your Honor again that the testimony at the trial before Mr. Justice Hill showed that this condition existed as of 1927; that there was a lake there at that time 30 feet deep. To assess this provision against this property now in this proceeding you would be saying in effect that the courts have a right to enforce legislation which legislates out of existence a valid, vested, predetermined, adjudicated nonconforming use, because what they are doing here by this provision is to say, "Yes, you have adjudicated your right to mine without limitation on depth before Mr. Justice Hill, but now we say, since you are less than 2 feet above maximum ground water level, you are prohibited from going deeper."

The practical effect of that application, Judge, is to tell us to put a padlock on our door, because I tell your Honor now we cannot dig one more barrel of sand, except maybe on one or two of the berms, and we are out of business if that is put against us. I say on a constitutional basis it would be confiscation of our property without just compensation. There has been no proof offered by the plaintiff that the maintenance of such a lake is in any way danger- [fol. 224] ous. In fact, they have sumps of their own that are always filled with water which are below the water table; there are many lakes and ponds below the water

table; there is nothing inherently dangerous about a lake or a pond.

Therefore, I submit that they have utterly failed to adduce any testimony whatsoever with respect to the need for injunctive relief. There is no irreparable injury shown by having a pond. If that is the case, nobody should ever live on the seashore and nobody should ever live at a lake, it is too dangerous.

On the second cause of action, I further move to dismiss on the ground that the necessary allegation of the complaint that there is an adequate remedy at law has not been met by the plaintiff, in that the ordinance by its own terms specifies that a violation of the ordinance is a misdemeanor. Therefore, there exists an adequate remedy at law for the Township to bring a criminal proceeding in the District Court of the County of Nassau, and on that ground I further move to dismiss the second cause of action.

Further, I move to dismiss the second cause of action on the ground that the plaintiff has utterly failed to prove any irreparable injury to warrant injunctive relief in this case.

I move to dismiss the first cause of action, also on the ground that an adequate remedy at law does exist for enforcement of the ordinance, contrary to the allegation in [fol. 225] that cause of action, and further, also, that no irreparable injury has been shown to warrant the injunctive relief in this action.

All the plaintiff has been content to do here is to come in and say, "Here is my ordinance, here is one man who says that when he looks at it there is not exact compliance with the letter and terms thereof, please give us an injunction." That is their whole case, in sum and substance. They have failed to prove any other dire necessity, need or injury.

Further with respect to the first cause of action, I respectfully move to dismiss the requirement of a permit on the ground that if your Honor will dismiss the second cause of action, there is no need for a permit, because the permit is for the purpose of regulation. If there is nothing to regulate under the alleged violations of the second cause of action, there is no need for a permit.

Secondly, the ordinance by its own terms operates prospectively and not retrospectively, and Section 3, application for a permit, reads: "Before any excavation is commenced for any purpose, the owner shall obtain a written permit from the Town Board." It reads before commencing. We commenced our excavation, if my arithmetic is right, some eighteen years before they had the first regulatory ordinance requiring a permit under which this proceeding is brought. This is the ordinance in this case as last amended in November, 1958. The ordinance by its [fol. 226] very terms does not say that any excavations located within the township shall be regulated by permit. It says before you start an excavation you shall come in and get a permit. We started many years before.

On those grounds and the other grounds which I have argued before the court on the trial, I respectfully ask that the complaint be dismissed in its entirety and that the defendant be granted an affirmative judgment on its second counterclaim that we have a valid, vested nonconforming use as to the prohibitions set forth in paragraph eleventh of the complaint and the alleged violations of this ordinance; and, furthermore, a declaratory judgment that there is no violation existing at this time of the Ordinance No. 16 of the Town of Hempstead.

COLLOQUY

The Court: Thank you, Mr. Miller. Do you wish to say anything in reply for the record, Mr. Charles?

Mr. Charles: No, just that I move for judgment on the complaint, and I ask that the first separate and complete defense be stricken and dismissed, and I also ask that the second separate and complete defense and counterclaim be stricken from the record, and that judgment be granted in accordance with the relief sought in the complaint.

The Court: Is that all, gentlemen?

Mr. Charles: That is right.

The Court: That is your reply to Mr. Miller for the rec- [fol. 227] ord. Now, how much time do you gentlemen wish for briefs?

Mr. Miller: Judge, frankly, I feel it is incumbent upon Mr. Charles and myself to try to accommodate to your Honor's summer schedule. I realize that we are fast approaching the summer. If your Honor possibly might give us an indication of the latest time that your Honor would favorably like to receive the briefs, in other words, may we have, say, ten days, because I would like to get two weekends in on it, Judge, that is what I am thinking of, so I can spend two weekends at the law library in New York.

The Court: Today is June 18. I would like to have your main briefs in by the 29th. Is that pushing you too hard?

Mr. Miller: No, I could do it with two weekends.

The Court: I would like to have your main briefs by the 29th, and I would like to have answering briefs to the main briefs, if you so desire, in by Friday, July 3. Is that pushing you too hard?

Mr. Miller: No. Satisfactory to me. Mr. Charles?

Mr. Charles: Yes, sir.

The Court: I do not know whether you want to get the minutes for me or not.

Mr. Charles: I have the first day's session. I will submit the complete record of the trial with my main brief.

The Court: All right. I am reserving decision until such time as you gentlemen give me your scholarly briefs.

[fol. 228] Mr. Miller: Shall we submit all exhibits with the briefs, Judge?

The Court: Yes. I do not want them now. I would prefer that you file your main briefs with the Court as soon as they are ready. In other words, the moment you exchange your main briefs, file the main briefs with the court so that if I wish to start working on the main briefs I can do so, and then I will await your answering briefs when they come in later on.

Statement That Case Contains All the Evidence

The foregoing contains all the evidence and testimony offered and given upon the trial of this action.

[fol. 229]

IN THE SUPREME COURT OF NEW YORK

COUNTY OF NASSAU

OPINION OF MR. JUSTICE MARIO PITTONI

The Town sues to enjoin the defendants from mining and dredging a certain sand pit located on the east side of Newbridge Avenue in the East Meadow section of the Town until the defendants obtain a permit required by Town Ordinance No. 16, and until violations of Section 4 of that ordinance are cured.

The defendants in their answer claim *res adjudicata*, protection of the *ex post facto*, of the due process and of the equal protection clauses of the Constitutions, and the motives of the Town officials as defenses.

It appears that the subject property, hereinafter sometimes called the sand pit, is 38 acres in size and has been used for the commercial mining of sand and gravel since 1927.

On December 18, 1945, the Town adopted Ordinance No. 16 entitled, "Bank and Pit, Topsoil Removal and Other Excavations". Its declaration of policy (Section 1) states among others that the ordinance was "to prevent all manner of excavations which create pits, holes, or hollows in the earth, leaving it in a hazardous or dangerous state, or cause soil erosion . . . to remove the danger to health and life caused by deep excavations remaining in the ground: . . . which ordinance will promote the safety, health and general welfare of the people of the Town".

The ordinance then goes on to say:

> "Section 4 (as amended Nov. 25, 1958) (a) No Pit Excavation shall be made within twenty (20) feet of any property line.
>
> (b). No pit or bank excavation shall be made greater than ten (10) feet below the established grade of the [fol. 230] nearest public street or highway unless the side walls remain at an incline of at least two horizontal feet to one vertical foot or are supported by retaining walls . . .

(c). . . . All pit and bank excavations shall be completely surrounded by wire fencing of the type known as chain link or cyclone fence, or its equivalent, of the height of six (6) feet set on a concrete curb not less than 18 inches in depth, with no opening except necessary gates for ingress and egress, to prevent public access to the top of any pits or deeply graded slopes.

(e). No removal of earth from the ground shall be so made as to undermine, weaken or deprive of support other lands in the vicinity . . .

(g). No removal of earth from the ground shall be so made as to prevent or interfere with the orderly development, for residential, business, manufacturing or public purposes, of other lands in the vicinity, . . . or as to substantially depreciate the value of real property in the vicinity.

(h). No excavation shall be made below two feet above the maximum ground water level at the site.

(i) The Town Board may deny any application for a permit hereunder if it shall find that the proposed excavation will violate any of the provisions of this section, . . .

(j). When earth has been removed from any part of any pit excavation area to the maximum extent al- [fol. 231] lowable under this ordinance, . . . such pit or part thereof shall be immediately refilled with clean, non-burnable fill . . . and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads."

In the meantime, and since the subject property was first used as a commercial sand mining and dredging operation, the surrounding area of East Meadow has changed from a sparsely to a densely populated region, and the subject property has become a huge crater, or sand pit, in which there is an artificial lake that extends over 20 acres of the pit. The average depth of the water in this lake is

approximately 25 feet, but in some areas the water is as deep as 48 feet. There is a link fence around the sand pit, but there is no concrete curb beneath it; and there are several holes under this fence, evidently dug by children, and large enough for human beings to crawl through. In numerous areas the pit commences at a distance less than 20 feet from the nearest property line, and in at least one instance the excavation commences at a distance less than 10 feet. The slopes of the sides of the pit in many places exceed two horizontal feet to one vertical foot. Also, the pit is more than 10 feet below the grade of the nearest public street.

Within a radius of 3,000 feet of the center of the sand pit are 2,200 homes with an estimated population of 8,800 persons; within a radius of 3,500 feet are 4 public schools with an enrollment of 4,532 pupils; and within a radius of [fol. 232] 1,500 feet of this pit is a church where each week 3,600 pupils receive religious instruction.

Evidence on behalf of the defendants establishes that there are certain excavations, some dry and some water filled, and bodies of water such as lakes, brooks, streams, creeks, etc. within the town which are not in conformance with the standards of the ordinance. However, there was no evidence as to whether these excavations and bodies were private, governmental, in use, or abandoned. A New York City owned reservoir with no fence and a sharp slope was also shown.

A county official called by the defendants testified that there are approximately 400 water drain basins or sumps in Nassau County. Of these 300 are owned and supervised by the County and have fences around them; but approximately 100 of these still have no concrete curbs under the fences although the County has since 1952 been installing these curbs. The berm width specifications for these County sumps vary with the nature of the sand and the topographical conditions encountered. It was pointed out too that sumps by and of their very nature must be constructed so that the bottom is above maximum level, and that the standard regulation for the construction of sumps calls for a minimum of two feet above maximum ground water.

The first defense raised by the defendants is *res adjudicata*. This is based upon a judgment entered April 9, 1956 in an action by the Town against the same defendants to enjoin them from operating the sand pit in violation of a zoning (Ordinance No. 16, Sec. 1). In the very *Town of ler,* (sic) 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537, denied the injunction on the ground that the [fol. 233] defendants' substantial operation of the sand pit prior to the enactment of the zoning ordinance entitled the defendants to a non-conforming use. The issue in that case was one of vested property rights in the face of subsequently enacted zoning restrictions. The present action by the Town is pursuant to an ordinance which regulates uses regardless of locations or zones under its governmental police powers for "the safety, health and general welfare of the people of the Town" (Ordinance No. 16, Sec. 1). In the very *Town of Somers* v. *Camarco* (308 N. Y. 537, 541), case cited by Mr. Justice Hill, the court said:

> "We do not pass upon the question of what may be a proper exercise of the town's police powers so as to prevent the creation or maintenance of a nuisance on the premises of the defendants, or to otherwise lawfully regulate the defendants' business."

A judgment in one action is not conclusive when the two causes of action are different in the rights and interests affected, and the estoppel of *res adjudicata* is limited in such circumstances to the point actually determined. It is clear, therefore, that the causes of action and the issues of these two cases are not the same, and that the substance of the rights or interests established in the first action will not be destroyed or impaired by the prosecution of the second (*Schuylkill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 307, 308).

It should be added that a motion by the defendants to dismiss a similar complaint against them by the Town on the grounds of *res adjudicata* was denied by Mr. Justice Christ on September 13, 1956 (No. 6447—1956, Cal. No. [fol. 234] 209) when he said: " . . . it is plain that the issues indicated by the present complaint were not adjudicated in the prior action".

Another defense is that the sand pit was operated prior to the enactment of the ordinance and for that reason is immune against the exercise of this regulatory police ordinance. However, it is firmly established that a prior non-conforming use, whether judicially declared or not, does not make it immune against laws, ordinances and regulations of a police nature such as the one now in issue (*Queenside Hills* v. *Saxl*, 328 U. S. 80, 84; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, 184 N. Y. S. 2d 64, certiorari denied by U. S. S. C. June 8, 1959; *Health Dept.* v. *Rector, etc.*, 145 N. Y. 32, 43, 44; *Town of North Hempstead* v. *Colonial Sand, etc.*, Hogan, J., 14 Misc. 2d 727, 731, 178 N. Y. S. 2d 579, 583; *People* v. *Gerus*, Johnson, J., Nassau Co., 69 N. Y. S. 2d 283, 287, 288, 289).

The defendants also argue that the ordinance applies only to sand pits which are to be started in the future and that it does not apply to sand pits in being at the time of its enactment. A reading of the ordinance shows no provision exempting sand pits in operation at the time of its enactment, and it is obvious that the ordinance was intended to apply also to pits already in being and in operation. Whereas the opening of future sand pit excavations could be controlled by zoning regulations, the only protection against the abuse of existing uses has to come from these regulatory ordinances. This is particularly true when it has already been held that the defendants have the right to a non-conforming use under the authority of *People* v. *Miller*, 304 N. Y. 105, 107 and *Town of Somers* v. [fol. 235] *Camarco*, 308 N. Y. 537. Under the circumstances, it would be unreasonable to hold that the Town, which was aware of the dangers posed by unregulated excavations (see Declaration of Policy of Ordinance No. 16, Sec. 1), could have intended to exempt the sand pits in operation at the time of the adoption of the ordinance. Ordinances similar to this one have been interpreted as applying to sand pit uses in being at the time of the enactment of the ordinance (*Town of North Hempstead* v. *Colonial Sand, etc.*, Hogan, J., 14 Misc. 2d 727, 731, 178 N. Y. S. 2d 579, 583; *People* v. *Gerus*, Johnson, J., 69 N. Y. S. 2d 283). In the *Town of North Hempstead* v. *Colonial Sand, etc.* case, Mr. Justice Hogan said:

"Nor is there merit in their contention that the ordinance, by its express language, is intended to apply only to operations commenced after its adoption. It is a well settled rule of statutory construction that an act shall be interpreted in the light of the mischief felt and the objects and the remedy in view (McKinney's Consol. Laws, Vol. 1, Statutes, sec. 95 and cases cited therein). The Town Board cannot have intended in 1946, that an established operation should be permitted to continue untrammeled while a new one of precisely the same nature required drastic controls. It is equally well settled that 'A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination' (McKinney's Consol. Laws, Vol. 1, Statutes, sec. 147). Accordingly, the Court holds that the ordinance [fol. 236] is intended to operate equally upon all operations of a similar nature, regardless of the date upon which each was commenced. This interpretation needs no reconciliation with the Declaration of Policy, the preamble of the ordinance (supra)."

Still another defense raised by the defendants is *ex post facto*. Obviously, such a defense has no place in this civil trial; that doctrine applies only to criminal cases (*Calder* v. *Bull*, 3 Dall. 386, 390; *Kentucky Union* v. *Kentucky*, 219 U. S. 140, 152, 153; *Bankers Trust* v. *Blodgett*, 266 U. S. 647, 652; *Matter of L'Hommedieu* v. *Board of Regents*, 276 App. Div. 494, aff'd 301 N. Y. 476; 16 C. J. Secun., Const. Law, Secs. 435, 437).

The defendants also contend that the ordinance is unconstitutional in that it is confiscatory and unreasonable as applied to them. In this respect they contend that the plaintiff has failed to establish the reasonableness of the ordinance itself. But it is fundamental that an ordinance such as this is presumed constitutional (*Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, 210); that the burden of showing the ordinance to be unreasonable rests upon the assailant (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, 118; *N. Y. Trap Rock Corp.* v. *Town of Clarkstown*, 2d Dept.,

1 App. Div. 2d 890, 149 N. Y. S. 2d 290, 293, aff'd 3 N. Y. 2d 844); and that this unconstitutionality must be established beyond a reasonable doubt (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Defiance Milk Products Co.* v. *DuMond*, 309 N. Y. 539, 540, 541). Only as a last resort may courts strike down legislative enactments on the [fol. 237] ground of unconstitutionality (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Matter of Ahern* v. *South Buffalo Railway Co.*, 303 N. Y. 545, 555, aff'd 344 U. S. 367).

Under the tests as above stated the defendants have failed to sustain their burden of proof; in fact, little, if any, evidence was adduced to show the unreasonableness of the provisions concerning the width of the berms, fences, depth requirements and the like. They did give testimony that no cave-ins had occurred at the sand pit within the past thirty years. However, even if that be true, the Town is not precluded from anticipating a danger and providing for a protection against it before it materializes. This is proper within its police power (*City of Rochester* v. *West*, 164 N. Y. 510, 514; *Town of Southport* v. *Ross*, 3 Dept., 284 App. Div. 598, 132 N. Y. S. 2d 390, 392). Against this danger clearly recognized by the Town (Ordinance No. 16, Sec. 1), the defendants produced nothing to show that the ordinance had no reasonable relation to the dangers and undesirable features inherent in their sand pit.

Even without the benefit of the presumption of validity the provisions of the ordinance are clearly suited for the curtailment of the obvious dangers. Thus, the requirements concerning setbacks, slope requirements, fences, retaining walls, maximum ground levels and other such requirements, all provide protection against the danger of cave-ins, falls and drownings. These requirements are particularly pertinent here where the sand pit is a huge sprawling crater filled with water to an average depth of some 25 feet and forming a permanent, artificial lake of [fol. 238] stagnant water in a densely populated community with thousands of children.

Then too, the right to use one's property may run in conflict with the interests of adjoining land owners. It is one thing to use your property—it is another to empty, to

exhaust or to deplete your property so as to cause cave-ins or otherwise undermine the properties of adjoining land owners. It is obvious without further belaboring the point that the deeper the digging and the closer to the adjoining land, the greater the danger to the latter and the homes thereon caving in.

Other considerations, such as the detrimental effect of this sand pit on the property values in the neighborhood, although not by themselves persuasive, add support to the reasonableness of this ordinance (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298; *Post Brick Co., Inc.* v. *Thompson*, Hallinan, J., 68 N. Y. S. 2d 159; *People* v. *Gerus*, Johnson, J., 69 N. Y. S. 2d 283, 291).

It may be that the enforcement of this ordinance will result in some economic hardship to the defendants; however, the exercise of police power in the interests of the public at large is generally in conflict with individual interest; and if the end sought is legitimate and the law is not arbitrary the individual interest must bow to the interest of the general welfare. This is particularly true when the object of the law poses a serious threat to public safety (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 302; *Hadachek* v. *Sebastian*, 239 U. S. 394).

In support of the defendants' contention that their property is being confiscated, there is nothing in the evidence to sustain it. There is no evidence to show that the defen- [fol. 239] dants cannot conform to the ordinance or what the cost to the defendants would be if they attempted to conform. Under the circumstances the Court cannot guess or read into the record proof which is not there (*City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505). In the *Rentways* case, Judge Fuld said:

> "...defendants, though they have attacked the ordinance as confiscatory, have completely failed to establish or present proof that there has been confiscation in fact.... Completely absent is any showing that ... if such structure were impossible, that such could not be converted to some other profitable use."

Even if the defendants had established that the enforcement of the ordinance were a practical prohibition, it would not be of assistance to them in this case where the

danger to the public safety and welfare is a real and serious one. (*Hadachek* v. *Sebastian*, 239 U. S. 394; *People* v. *Gerus*, Johnson, J., 69 N. Y. S. 2d 283, 287, 288, 289; *Lizza & Sons, Inc.* v. *Town of Hempstead*, Johnson, J., 69 N. Y. S. 2d 296, aff'd 272 App. Div. 921, 71 N. Y. S. 2d 14.)

Although the defendants did not allege the protection of the equal protection clauses of the Constitutions in their answer, they did take the position at the trial that the prosecution of this action against them constitutes discriminatory enforcement; that is, a failure to enforce the ordinance as against "other areas which violate the same ordinance." If we assume, for the sake of argument, laxity on the part of the public officials in the enforcement of the ordinance so as to result in unequal application of the law, that would [fol. 240] not by itself constitute this present action a violation of the equal protection clauses. It is only where the party affected can show a palpable and deliberate scheme to oppress him while excluding all others who come within the terms of the ordinance that such an objection can be sustained (*Williamson* v. *Lee Optical*, 348 U. S. 483, 489; *Snowden* v. *Hughes*, 321 U. S. 1, 8, 15; *People* v. *Friedman*, 302 N. Y. 75, 80, 81).

In the *Friedman* case the court said that it is not required under the equal protection clauses that the ordinance "be perfectly symmetrical in its pattern of exclusion and inclusion." And again, quoting from the same case, the proof here does not show "a pattern of discrimination conciously practiced, as in *Yick Wo* v. *Hopkins*, 118 U. S. 356; it merely indicated some non-enforcement as to certain other businesses, many of which were allowed to remain open for the sale of permitted commodities."

An examination of the defendants' evidence fails to show that they have sustained their burden of proof in this respect. Their evidence merely establishes that certain excavations, some dry and some water-filled, and certain bodies of water, such as lakes, brooks, streams, creeks, etc. within the Town exist without conforming to the standards of the ordinance involved. The defendants have failed to show whether these excavations and bodies of water were private, governmental, abandoned or in use. Furthermore, none of these were shown to be presently operated or oper-

ating sand pits; against which the ordinance is directed. Also, during the trial the defendants took the position that the ordinance should have been enforced against the Nas-
[fol. 241] sau County sumps; however, these county properties are dedicated to a vital public use and therefore do not come within the terms of the ordinance (Secs. 2 and 9). Then too, what authority would the Town have to act against the County, another and superior governmental body?

If the defendants contend that the exemption of these County properties constitute discrimination, not in the enforcement but on the face itself, then too that contention is not acceptable. The equal protection clauses do not deprive a municipality of the power to classify in the adoption of police power regulations; for it is well recognized that evils in the same area may be of different dimensions and proportions requiring, at least in the legislative body's opinion, different remedies (*Tigner* v. *Texas*, 310 U. S. 141); and the legislative body may confine its regulations and restrictions to those cases where the need is deemed to be clearer or more apt to exist (*Packer Collegiate Institute* v. *University of the State of New York*, 3 Dept. 273 App. Div. 203, 208, 209, 76 N. Y. S. 2d 499, 505; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379). "With the wisdom of such choice the courts have nothing to do; it is a matter solely for the legislature to consider." (*Packer Collegiate Institute* v. *University of the State of New York*, 3 Dept. 273 App. Div. 203, 209, 76 N. Y. S. 2d 499, 505).

Clearly, there is a sufficient basis for the classification in the present ordinance. These County sumps, or basins, differ from the permanently flooded sand pit involved herein. First, the existence of these basins or sumps is a necessity throughout Nassau County as a matter of survival. They must from time to time contain varying amounts of [fol. 242] rain water; but this is not a permanent condition. It continues or lasts only so long as it is necessary for the trapped waters to run back into the ground. Furthermore, these basins or sumps all fall within the jurisdiction of the County of Nassau and are subject to the rules and regulations of that municipality. Thus, the County sumps or

basins are sufficiently distinct from the sand pit or sand pits affected by the ordinance to take this case out of the equal protection clauses of the Constitutions.

The defendants' further contention that the Town has failed to sustain the burden of proof on the inadequacy of a remedy at law is specious. The power to bring a criminal prosecution against the defendants for a violation of the ordinance herein is not such an adequate remedy at law which ordinarily bars injunctions. That is hornbook law for which no citation is needed. Furthermore, Section 135 of the Town Law states:

> "The Town Board may . . . maintain an action or proceeding in the name of the town in a court of competent jurisdiction to compel compliance with or to restrain by injunction the violation of any . . . ordinance, rule or regulation, *notwithstanding that the ordinance, rule or regulation may provide a penalty or other punishment for such violation.*" (Town Law, Sec. 135, as amended L. 1955, c. 326; L. 1958, c. 606.) (Emphasis supplied.)

The last point raised by the defendants is the alleged motives of the Town officials in bringing this injunction suit to court. It must be pointed out at the very outset that on principle alone this contention is not acceptable. Any prior action or lack of action on the part of public officials may not be used as a bar to the bringing of an action [fol. 243] when the action is in a representative capacity on behalf of the public. Public officials have no power and no right to waive their duties or obligations to enforce the law on behalf of the public for whom they are public servants. In other words, their individual actions are not binding upon the public whom they serve and on whose behalf actions such as this are and must be prosecuted. In short, the motives of the officials enforcing the ordinance are not relevant in this case (*Chase-Hibbard Milling Co.* v. *City of Elmira*, 207 N. Y. 460, 467; *Waterloo Woolen Manufacturing Co.* v. *Shanahan*, 128 N. Y. 345, 362).

In the *Chase-Hibbard* case the court said: "If the public authorities were authorized to do what they did do with

the river channels, the reasons that moved them do not concern the plaintiff . . . The assignment of an improper motive, or reason, for doing an act, which the municipality was authorized to perform could not make the act illegal."

In the *Waterloo* case the court said: "If the State has the right . . . then the motives that underlie the act are not material. The reasons that move the public authorities do not concern the plaintiff."

It does not appear that the defendants have raised any other issues.

The Court thus finds that Ordinance No. 16 and the enforcement thereof are valid exercises of the Town's police power; the plaintiff is therefore entitled to the relief demanded in the complaint.

This is the decision of the Court pursuant to Section 440 of the Civil Practice Act.

Settle judgment on notice.

J.S.C.

[fol. 244]

IN THE SUPREME COURT OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

[Title omitted]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto, subject to the approval of this Court, that the printing of the following exhibits:

Plaintiff's Exhibits:

1—Ordinance No. 16

2—Aerial photograph

3—Topographical survey plotting

4—Cross-sections and index

5A-5B—Two photographs

6A-6V—Twenty-two photographs

[fol. 245]

Defendant's Exhibits

A—Letter

B-1 & B-2—Photographs

C—Drainage plan map

D—Judgment roll

E—Decision November 30, 1956

F-1-3—Photographs

G—Twenty-one photographs

H—Reel of movie film

I—Transcript of testimony

J—Maps and surveys

may be dispensed with, in the interest of economy and to avoid unnecessarily encumbering the record, without prejudice to the right of any of the parties to refer to the same in the briefs or on the argument with the same force and effect as though printed in full.

It Is Further Stipulated and Agreed that upon the argument of this appeal the original or copies thereof will be handed up to the Court.

Dated: New York, September 25, 1959.

Edward M. Miller, Attorney for Defendants-Appellants.

John A. Morhous, Town Attorney and Attorney for Plaintiff-Respondent.

[fol. 246]

STIPULATION SETTLING CASE—September 25, 1959

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto, that the foregoing case contains all of the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated: New York, September 25, 1959.

Edward M. Miller, Attorney for Defendants-Appellants.

John A. Morhous, Town Attorney and Attorney for Plaintiff-Respondent.

ORDER SETTLING CASE—September 29, 1959

On the foregoing stipulation the above case on appeal which contains all the evidence and exceptions of all parties is hereby settled and ordered on file.

Dated: New York, September 29, 1959.

Mario Pittoni, J. S. C.

[fol. 247] STIPULATION WAIVING CERTIFICATION—September 25, 1959 (omitted in printing).

ORDER FILING RECORD IN APPELLATE DIVISION —September 29, 1959

Pursuant to Section 616 of the Civil Practice Act, it is

Ordered, that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, Second Department.

Dated: New York, September 29, 1959.

Mario Pittoni, J. S. C.

[fol. 249]

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

TOWN OF HEMPSTEAD, Plaintiff-Respondent,

against

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP., Defendants-Appellants.

STATEMENT UNDER RULE 234

This is an appeal from a judgment entered in the office of the County Clerk of Nassau County on August 4, 1959 which adjudged that Ordinance No. 16 of the Town of Hempstead and enforcement thereof, as applied to the activities and operations of defendants-appellants, are valid exercise of the Town's police power. The judgment enjoins the defendants-appellants from conducting their dredging and excavating of land belonging to them and dismisses the defendants' counterclaim which sought a judgment declaring the unconstitutionality of the Ordinance as applied to defendants' business and operations.

The judgment was affirmed by the Appellate Division, Second Department.

[fol. 250] Leave to appeal to the Court of Appeals was denied by the Appellate Division.

Defendants filed their notice of appeal to appeal to the Appellate Division to the Court of Appeals.

Defendants moved in the Court of Appeals for an order certifying their right to appeal to the Court of Appeals as a matter of right on the ground that the appeal involves directly a constitutional question; or in the alternative, for an order granting defendants' permission to appeal to the Court of Appeals. By order dated April 28, 1960, the Court of Appeals denied that part of the motion which sought leave to appeal on the ground that defendants had an appeal as a matter of right because a constitutional question is directly raised on this appeal.

Plaintiff is represented by John Morhous. Defendants-appellants are represented by Baar, Bennett & Fullen and Edward M. Miller, who have been substituted in place of Edward M. Miller. Except as stated, there have been no changes of parties or attorneys since the commencement of the action.

[fol. 251]

IN SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS—March 10, 1960

Please Take Notice that the defendants-appellants above named, relying solely upon questions directly involving the construction of the 14th Amendment of the Constitution of the United States of America and Article 1, Sections 6 and 7 of the Constitution of the State of New York, hereby appeal as of right to the Court of Appeals of the State of New York from the Judgment of the Appellate Division of the Supreme Court, Second Judicial Department, entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, which unanimously affirmed a judgment of the Supreme Court of Nassau County in the above entitled proceeding, entered in the office of the Clerk of the County of Nassau on the 4th day of August, 1959, which Judgment adjudged (1) that Ordinance No. 16 of the plaintiff Town and the enforcement thereof are valid and con-
[fol. 252] stitutional and proper exercises of the plaintiffs-respondents' police powers, and (2) that defendants' counterclaim which directly raises the issue of the constitutionality of Ordinance No. 16 be dismissed, and defendants-appellants appeal from each and every part of the said judgment as well as from the whole thereof.

Dated: March 10, 1960.

Yours, etc.,

Baar, Bennett & Fullen and Edward M. Miller, Attorneys for Defendants-Appellants, Office & Post Office Address, 29 Broadway, New York 6, N. Y.

To:

John A. Morhous, Esq., Town Attorney and Attorney for Plaintiff-Respondent, Town Hall, Front Street, Hempstead, New York.

Clerk of the County of Nassau.

Clerk of the Appellate Division of the State of New York, Second Judicial Department.

[fol. 252a]

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 29th day of December, 1959.

Present:

Hon. Henry G. Wenzel, Jr., Acting Presiding Justice, Hon. George J. Beldock, Hon. Henry L. Ughetta, Hon. James T. Hallinan, Hon. Philip M. Kleinfeld, Justices.

Town of Hempstead, Respondent,

—v.—

Herbert W. Goldblatt and Builders Sand & Gravel Corp., Appellants.

Order of Affirmance—December 29, 1959

The above named Herbert W. Goldblatt and Builders Sand & Gravel Corp., the defendants in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the

office of the Clerk of the County of Nassau on the 4th day of August, 1959, after trial, adjudging, inter alia, that a certain ordinance and the enforcement thereof are valid exer- [fol. 252b] cises of the police power of respondent, and that appellants be enjoined from conducting such operations, herein, and the said appeal having been argued by Mr. Edward M. Miller of Counsel for the appellants and argued by Mr. William C. Mattison of Counsel for the respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the judgment so appealed from be and the same hereby is unanimously affirmed, with costs.

Enter:

John J. Callahan, Clerk.

[fol. 253]

IN SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND DEPARTMENT

TOWN OF HEMPSTEAD, Plaintiff-Respondent,

against

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP., Defendants-Appellants.

JUDGMENT OF AFFIRMANCE WITH NOTICE OF ENTRY—
January 21, 1960

The defendants above named having appealed to the Appellate Division, Second Department, from the judgment entered in this action on the 4th day of August, 1959 in the office of the Clerk of Nassau County, which judgment adjudged, inter alia, that a certain ordinance and the enforcement thereof are valid exercises of the police power of respondent and that defendants be enjoined from conduct-

ing certain of their operations, and the appeal having been heard at a term of the Appellate Division of the Supreme Court, Second Department, and an order of said Appellate Division having been made and entered unanimously affirming said judgment with costs of said appeal to the respondent:

Now, on motion of Richard P. Charles, 32 Court St., Brooklyn, N. Y., Attorney for the respondent;

[fol. 254] It is hereby adjudged that the said judgment be, and the same hereby is, unanimously affirmed, and that the Town of Hempstead, Front St., Hempstead, the respondent herein, recover of Herbert W. Goldblatt of 127 Stevens Ave., Hempstead, N. Y. and Builders Sand & Gravel Corp., of Newbridge Ave., East Meadow, N. Y., the appellants herein, the sum of $339.67, costs and disbursements of said appeal and that it have execution therefor.

January 21st, 1960.

Francis J. Anderson, Clerk.

NOTICE OF ENTRY

Sir:

Please Take Notice that the within is a true copy of a Judgment this day duly made and entered herein in the office of the Clerk of Nassau County.

Dated, N. Y., January 21st, 1960.

Yours, &c.,

Corner, Weisbrod, Froeb & Charles, Attorneys for Plaintiff, Office and Post Office Address, 32 Court Street, Borough of Brooklyn, New York City.

To:

Edward M. Miller, E[illegible], Attorney for Defendants.

[fol. 255]

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 7th day of March, 1960.

Present:

Hon. Gerald Nolan, Presiding Justice. Hon. George J. Beldock, Hon. Henry L. Ughetta, Hon. Marcus G. Christ, Hon. Nicholas M. Pette, Justices.

[Title omitted]

ORDER OF APPELLATE DIVISION DENYING MOTION FOR LEAVE TO APPEAL TO COURT OF APPEALS WITH NOTICE OF ENTRY—March 18, 1960

The above named Herbert W. Goldblatt and Builders Sand & Gravel Corp., the appellants in this action have made a motion for leave to appeal to the Court of Appeals and for other relief; and the motion having been duly submitted:

[fol. 256] Now on reading and filing the papers in support of and in opposition to said motion; and all the papers upon which the appeal was heard; and due deliberation having been had thereon:

It is Ordered that the said motion be and the same hereby is denied.

Enter,

John J. Callahan, Clerk.

NOTICE OF ENTRY

Sir:

Please Take Notice that the within is a true copy of an Order this day duly made and entered herein in the office of the Clerk of Supreme Court, Second Department.

Dated, N. Y., March 18, 1960.

Yours, &c.,

Corner, Weisbrod, Froeb & Charles, Attorneys for Plaintiff, Office and Post Office Address, 32 Court Street, Borough of Brooklyn, New York City.

[fol. 257]

ORDER OF COURT OF APPEALS DENYING MOTION FOR LEAVE TO APPEAL—April 28, 1960

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of April, A. D. 1960.

Present:

Hon. Charles S. Desmond, Chief Judge, presiding.

[Title omitted]

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied upon the ground that an appeal lies as of right.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 258]

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-eighth day of April, A. D. 1960.

Present:

Hon. Charles S. Desmond, Chief Judge, presiding.

[Title omitted]

ORDER OF COURT OF APPEALS GRANTING MOTION CERTIFYING CONSTITUTIONAL QUESTION—April 28, 1960

A motion having heretofore been made herein upon the part of the appellants for an order certifying that a constitutional question is involved upon the appeal herein and

papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted.

A copy

Gearon Kimball, Deputy Clerk.

[fol. 259]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION

DECISION OF APPELLATE DIVISION

By Wenzel, Acting P. J., Beldock, Ughetta, Hallahan and Kleinfeld, JJ.

In an action to enjoin sand mining and related operations allegedly carried on in violation of a town ordinance, the appeal is from a judgment, entered after trial, adjudging inter alia, that the ordinance and the enforcement thereof are valid exercises of the police power of respondent, and that appellants be enjoined from conducting such operations. Judgment unanimously affirmed, with costs. No opinion.

[fol. 260] STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS—August 18, 1960 (omitted in printing).

[fol. 261] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 262]

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

TOWN OF HEMPSTEAD, Respondent,

v.

HERBERT W. GOLDBLATT et al., Appellants.

OPINION—Decided January 19, 1961

BURKE, J. The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in violation of the due process clause of both the Federal and State Constitutions.

The defendants seek to revise a judgment of the Appellate Division unanimously affirming a judgment of Special Term upholding the constitutionality of the ordinance and enjoining the defendants from conducting sand mining and excavation on certain property in the Town of Hempstead until a permit has been issued and certain violations of the ordinance have been corrected. They contend that the ordinance cannot be sustained as a valid exercise of police powers and that it violates defendants' vested rights in an established nonconforming use.

Since the courts below have unanimously found that the defendants' proof failed to overcome the presumption of constitutionality and to establish the unreasonableness of the regulations, we may not hold that the ordinance which is an exercise of the town's statutorily delegated police power is invalid, unless there is no justification on "any state of the facts". (*United States* v. *Carolene Prods. Co.*, 304 U. S. 144, 154.)

The sand and gravel pit in question lies in the midst of a densely populated residential area. Included within a radius of 3,500 feet are more than 2,200 homes and 4 schools with an enrollment of 4,500 children. The pit itself occupies a 38-acre tract of which approximately 20 acres

is beneath an artificial lake with an average depth of 25 feet. In order to provide protection against the danger of cave-ins, falls, drownings and water pollution, the ordinance makes provision for setbacks, degrees of slope, barricades, fences, lights, retaining walls and maximum ground water level. Neither the injunction granted nor the ordinance proscribes any future excavation. The injunction merely conditions future operation upon the issuance of a permit from the Town of Hempstead, and the correction of certain violations of the ordinance. There are approx-[fol. 263] imately 18 acres which are available for excavation. The hazards to both life and property accompanying the uncontrolled operation of these pits are common knowledge, and their restraint need not await an event.

The minimal safety standards currently required by the Town of Hempstead have not been demonstrated under the circumstances here to be an unreasonable means to accomplish this end. Upon this record a threat to the community's welfare may at least be said to be "reasonably apprehended". (*Wiggins* v. *Town of Somers*, 4 N Y 2d 215, 219.) "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining [case cited]. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community." (*Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410.) It is not the function of the courts but of legislators to determine the "reasonableness, wisdom and propriety" of the regulations needed to protect the community (*South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191), and their regulatory power, as the United States Supreme Court has pointed out, governs preexisting uses (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N Y 2d 370, cert. denied, 360 U. S. 902). Recognizing, there-

fore, that this court may not question the need for the legislation (*Olsen* v. *Nebraska*, 313 U. S. 236, 246) where there is found, as here, a rational basis for the legislative choice and no factual support for declaring it arbitrary (*Lincoln Bldg. Associates* v. *Barr*, 1 N Y 2d 413, 418-420), we do not believe that this ordinance can be declared as a matter of law to go beyond regulation to a degree which would impair its validity.

The judgment appealed from, therefore, should be affirmed, with costs.

VAN VOORHIS, J. (dissenting). Defendants appeal as of right from a judgment upholding the constitutionality of Ordinance No. 16 of the Town of Hempstead, and enjoining the defendants from operating a sand and gravel pit until a permit has been issued by the Town of Hempstead, and certain violations of the said ordinance have been corrected. The defendant, Goldblatt, is the owner of 38 acres of land located in the Town of Hempstead, which is the property involved in this litigation. The other defendant, Builders Sand and Gravel Corp., is the operator of the business of excavating and selling the sand and gravel taken from the land. The property was purchased by [fol. 264] Mr. Goldblatt's father in 1927 and the excavation and sale of sand and gravel has been carried on since 1927. Within a year after operations began, the excavation had gone below water level and an artificial lake was created, averaging now approximately 25 feet in depth.

The entire premises of defendant Goldblatt are surrounded by 7,000 lineal feet of a 6-foot chain-link fence, topped by 3 strands of barbed wire. The fence was built and the gravel pit was operated in accordance with a 1945 ordinance and is admittedly in conformity therewith.

When the 38 acres of land owned by defendant Goldblatt were purchased and dredging operations began in 1927, the surrounding property was mainly farm land. The first provision for residential zoning of property was enacted in January, 1930. Thereafter and during the time defendants continued their dredging operations, the surrounding area became heavily populated. Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants'

operations and the artificially created lake were evident and obvious.

In 1956 the plaintiff town brought to trial its first legal proceeding to terminate the defendants' dredging operations. That was a suit in Supreme Court, Nassau County, to restrain defendants from operating on the theory that defendants' dredging operations constituted a violation of the Zoning Ordinance of the Town of Hempstead.

It was held that defendants had a legal right, consisting of a prior nonconforming use, to continue their excavation and operations under water on their "entire premises * * * notwithstanding any Ordinances of the plaintiff". The opinion of Justice Hill states: "I find that the defendants are now and have been since 1927 conducting a prior nonconforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant a continuance of this nonconforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537." No appeal was taken from the judgment entered upon the opinion of Mr. Justice Hill.

In 1958 Ordinance No. 16 was amended to prohibit all excavation below water level and to require the filling in of excavations previously made. Defendants now conduct the only sand and gravel business by dredging in Hempstead and it would appear that the ordinance was aimed directly at them.

In the 1956 litigation before Mr. Justice Hill, the town did not bring into litigation or rely on the provisions of the original 1945 Ordinance No. 16 for the reason that defendants' operations complied with the regulatory provisions of the 1945 ordinance. It was not until the 1958 amendment of the ordinance that excavation below ground water level was prohibited.

[fol. 265] The plaintiff township would distinguish an invalid retroactive zoning ordinance attempting to eliminate a "nonconforming use" (*Matter of Harbison* v. *City of Buffalo*, 4 N Y 2d 553; *Town of Somers* v. *Camarco*, 308 N. Y. 537) from a "regulatory" ordinance which regulates the nonconforming use in the interest of public health and safety (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N Y 2d 370, cert. denied 360 U. S.

902). Both lower courts applied this distinction and held that the 1958 ordinance was a proper police power regulation designed to abate a dangerous situation.

While in a proper case the distinction is a valid one, the record here indicates a systematic attempt to force the defendants out of business. The decision below has that practical effect. A condition of continuing the business requires defendants to fill the existing excavation at a cost in excess of $1,000,000. If this is not done, the ordinance purports to render defendants criminally liable for separate misdemeanors during each week until the pit is refilled. This particular portion of the ordinance, we may note, in addition to other objectionable features, serves, in effect, to render criminal an act "innocent when done" (*People* v. *Oliver*, 1 N Y 2d 152, 158). In consequence it may well be regarded as oppressive, and condemned by the constitutional prohibition against ex post facto laws (U. S. Const., art. I, § 10). In other words, under the challenged ordinance as it now stands, defendants are susceptible of criminal prosecution for not filling in the excavation (to the extent of approximately 1,000,000 cubic yards) lawfully created over the years prior to enactment of the ordinance, by means of the lawful removal of sand, and in the course of prosecuting a lawful business.

A reading of the *Saxl* and *Engelsher* cases (*supra*) cited by the respondent town indicates that they were truly mere "regulatory" ordinances which did not operate to confiscate and prohibit absolutely. Since Ordinance No. 16 virtually eliminates the nonconforming use and prohibits unconditionally and finally all underwater dredging previously conducted on 20 acres of defendants' property, the theory of "regulation" cannot reasonably be sustained. The following observation of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon* (260 U. S. 393, 415-416) is applicable: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

[fol. 266] Similar language was used by this court in *Arverne Bay Constr. Co.* v. *Thatcher* (278 N. Y. 222, 231).

In *People* v. *Calvar Corp.* (286 N. Y. 419) this court stated (p. 421): "Forceful argument may be made that a general and complete prohibition of such use of property, even where such use might be permitted without causing substantial injury to the community, would be unreasonable. That question must await determination until it arises. We express no opinion upon it. In this case there has been no such complete and absolute prohibition."

We think that this case falls within the ambit of the question left unanswered in the *Calvar* case.

Furthermore, in the *Harbison* case (4 N Y 2d 553, *supra*), it was held that the value of the investment in the property was relevant in determining the validity of an attempted elimination of a nonconforming use. In this case, defendants attempted to show the value of their investment but the trial court ruled against the introduction of such evidence. Such evidence was important and admissible under the majority ruling in the *Harbison* case and also under the doctrine in *People* v. *Miller* (304 N. Y. 105, 108, 109) where this court held that unless the "loss to the owner" of a prior nonconforming use is "slight and insubstantial" it could not be wiped out by an ordinance (see, also, *Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540, *supra*). The record does indicate, however, the substantial nature of defendants' business.

In *Trio Distr. Corp.* v. *City of Albany* (2 N Y 2d 690, 696), we held that an ordinance was invalid "prohibiting the conduct of an occupation under the guise of regulation."

Upon the argument the attorney for plaintiff-respondent said in answer to questioning that he does not contend that this condition amounts to a nuisance, but that excavations of this kind are subject to regulation by ordinance under the police power. Of course they are, in the interest of public health and safety, but an examination of the clauses in the 1958 amendments to this Ordinance No. 16 supports the contention that it was directed at this single operation and designed to accomplish what the 1956 lawsuit had failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance. The object is not to promote public

health or safety, but to end the operation of this business under the guise of regulation.

The very circumstance that this gravel pit was conducted in conformity with the 1945 regulatory ordinance was exploited by the town to trap defendants by changing the permitted grade of the declining angle of the slope of the pit from 45 to 30 degrees, and by requiring a concrete curb beneath the 7,000 feet of fence which was built according to the 1945 requirement. No object in the installation of this concrete curbing has been shown except that it would put defendants to the expense of removing the fence, laying the concrete and constructing a new fence. This, [fol. 266a] along with the prohibition of excavation below water level or more than 10 feet below the highway level, and the extension from 10 to 20 feet of the permitted distance between the excavation and the property line and the retrospective requirement of refilling all that had been excavated since 1927, shows that the purpose was expropriation rather than regulation.

In 1959 the United States Bureau of Mines statistics show that the business of excavating and selling sand and gravel in the country totalled more than $700,000,000 and more than $27,600,000 in New York State alone. Much must have been spent on Long Island where, respondent itself asserts, building operations have proceeded at a high rate in the Town of Hempstead. There is nothing inherently dangerous or evil about this business, nor about excavating under water, which, especially in this area, has been a vital necessity. The minutes of the trial before Justice Hill, in evidence here, show that the gross annual business of defendants was in excess of $200,000 and that their capital investment was approximately $241,000. All of this is important as indicating that this is a lawful business which the "Declaration of Policy" in the ordinance says it was enacted to suppress. The regulatory provisions of the ordinance adopted in 1945, it is virtually conceded, were adequate to furnish protection against whatever hazards were created by the sand and gravel pits. That appears to have been drawn in substantially the same form as in the case of towns generally in the County of Nassau. Nor does the circumstance alter the case that there are 18 more acres in the tract which the photographs show to be entirely

occupied by the machinery used in the operation of the sand and gravel pit. Even if the land on which the machinery is located could be utilized for excavation, it would not help the ordinance which unlawfully prevents the operation of a lawful business on the 20 acres. It may be noted that, although the trial court excluded evidence of the value of the installations, the assessed valuation is in evidence as $66,000.

In endeavoring to close this pit the town says much about the safety of children. They are protected by the regulatory provision of the ordinance as it was enacted in 1945 according to a pattern prevalent throughout the country. The one drowning mentioned in the entire history of this pit, which is not shown by the record but does appear, we are told, from the police reports, happened in 1944 before the enactment of any ordinance requiring a fence to surround the excavation. The evidence indicates the existence of ponds, drainage basins, sumps and other conditions of open water that have gone unmolested which appear to be more dangerous than the subject property because not surrounded by fences. The presence of violations of the ordinance elsewhere would not, of course, prevent its enforcement, but it confirms that the object here was not regulation [fol. 267] but prohibition of the conduct of this business. There are some hazards in the operation of any legitimate business. Automobiles are not kept off the highways for the reason that children as well as adults are occasionally injured or killed by them.

The judgment appealed from should be reversed and the complaint dismissed, with costs in all courts.

Chief Judge Desmond and Judges Dye and Fuld concur with Judge Burke; Judge Van Voorhis dissents in an opinion in which Judges Froessel and Foster concur.

Judgment affirmed.

[fol. 268] Judge's and Reporter's Certificate to foregoing paper (omitted in printing).

[fol. 269]

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of January, in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

Witness:

The Hon. Charles S. Desmond, Chief Judge, Presiding.

Raymond J. Cannon, Clerk.

No. 272

TOWN OF HEMPSTEAD, Respondent,

vs.

HERBERT W. GOLDBLATT & ano., Appellants.

REMITTITUR—January 19, 1961

Be It Remembered, That on the 20th day of August in the year of our Lord one thousand nine hundred and sixty, Herbert W. Goldblatt & ano., the appellants in this cause, came here unto the Court of Appeals, by Baar, Bennett & Fullen and Edward M. Miller, their attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Town of Hempstead, the respondent—in said cause, afterwards appeared in said Court of Appeals by John A. Morhous, its attorney,

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Milton I. Newman, of counsel for the [fol. 270] appellants, and by Mr. William C. Mattison, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, January 19, 1961.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 273]

At a Special Term, Part II of the Supreme Court of the State of New York, held in and for the County of Nassau at the courthouse located at 33 Willis Avenue, Mineola, New York, on the 15th day of February, 1961.

Present:

Hon. Edward Robinson Jr., Justice.

Index No. 4811/1959

Town of Hempstead, Plaintiff,

—against—

Herbert W. Goldblatt and Builders Sand & Gravel Corp., Defendants.

Order—February 15, 1961

The above named defendants having appealed to the Court of Appeals from the judgment of affirmance of the

Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, and the Court of Appeals having heard the cause argued by Mr. Milton I. Newman, of Counsel for the appellants and by Mr. William C. Mattison, of Counsel for the respondent and having adjudged that the judgment so appealed from be affirmed with costs and the Remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of Nassau, and upon the annexed affidavit of Richard P. Charles, sworn to the 9th day of February, 1961.

Now, on motion of Richard P. Charles, Special Counsel to John A. Morhous, Town Attorney of the Town of Hempstead it is

[fol. 274] Ordered, that the order of the Court of Appeals herein dated the 19th day of January, 1961 be and the same hereby is made an order of this Court and the judgment entered herein on the 21st day of January, 1960, be and the same hereby is affirmed and that a judgment of this Court be entered herein affirming said judgment with costs of said appeal to be taxed in favor of the plaintiff and against the defendants.

Enter

Edward Robinson, Jr., J.S.C.

Entered Feb. 15, 1961	Granted Feb. 15, 1961
Francis J. Anderson, County Clerk of Nassau County	Francis J. Anderson Clerk

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 275]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

File No. 4811/1959

TOWN OF HEMPSTEAD, Plaintiffs,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP., Defendants.

JUDGMENT ENTERED ON ORDER OF REMITTITUR—
February 21, 1961

The above named defendants having appealed to the Court of Appeals from the judgment of affirmance of the Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, and the Court of Appeals having heard said appeal and having ordered and adjudged that the judgment so appealed from be affirmed with costs and the Remittitur from the said Court of Appeals having been filed in the office of the Clerk of the County of Nassau and the order having been entered thereon on the 15th day of February, 1961 making the order of the Court of Appeals the order of this Court and directing the entry of a judgment of affirmance herein with the costs of said appeal to be taxed in favor of the plaintiff against the defendants.

Now, on motion of Richard P. Charles, Special Counsel to John A. Morhous, Town Attorney of the Town of Hempstead, Town Hall, Hempstead, N. Y. it is

Adjudged that the judgment of affirmance entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960 be affirmed; and it is further

[fol. 276] Adjudged that plaintiff, Town of Hempstead, Town Hall, Hempstead, N. Y., do recover of and have judgment against defendants, Herbert W. Goldblatt, 127 Stevens Ave., Hempstead, N. Y. and Builders Sand &

Gravel Corp., in the sum of $253.63, the costs and disbursements as taxed by the Clerk of this Court and that petitioners have execution therefor.

Dated, February 21, 1961.

Francis J. Anderson, Clerk.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 279]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NASSAU

TOWN OF HEMPSTEAD, Plaintiff,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP., Defendants.

NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES—March 28, 1960

I. Notice is hereby given that Herbert W. Goldblatt and Builders Sand and Gravel Corp. hereby appeal to the Supreme Court of the United States from the final order and judgment of the Court of Appeals of the State of New York dated January 19, 1961 affirming the judgment of the Appellate Division of the Supreme Court for the Second Judicial Department, entered January 21, 1960, which affirmed the judgment of this Court entered August 4, 1959; and also appeal from the judgment dated February 21, 1961, entered and filed on that date in the Supreme Court of the State of New York, Nassau County, adjudging that the judgment of affirmance be affirmed, and the order of the said Court dated February 15, 1961 directing the entry of said judgment of affirmance.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in the said transcript the following:

[fol. 280] (1) The record on Appeal filed in the Court of Appeals.

(2) This Notice of Appeal and proof of service thereof.

(3) The Remittitur of the Court of Appeals of the State of New York filed in this Court.

(4) The majority and dissenting opinions of the Court of Appeals of the State of New York rendered in this cause.

III. The following questions are presented by this appeal:

(1) Is Ordinance No. 16 of the Town of Hempstead (County of Nassau, State of New York) enacted on December 18, 1945, as amended on November 25, 1958 unconstitutional in that it violates the due process clause and the equal protection of laws clause of the Fourteenth Amendment to the Constitution of the United States?

(2) Is Ordinance No. 16 of the Town of Hempstead (County of Nassau, State of New York) enacted on December 18, 1945, as amended on November 25, 1958 unconstitutional in that it violates the *ex post facto* provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States?

Dated: New York, N. Y., March 28, 1961.

Baar, Bennett & Fullen and Edward M. Miller, Attorneys for Defendants, Herbert W. Goldblatt and Builders Sand and Gravel Corp., Office and P. O. Address, 29 Broadway, New York 6, N. Y.

To:

John A. Morhous, Esq., Town Hall, Hempstead, New York, Attorney for Plaintiff.

[fol. 281] Clerk's Certificate to foregoing paper (omitted in printing).

Proof of service (omitted in printing).

[fol. 282]

SUPREME COURT OF THE UNITED STATES

No. 881—October Term, 1960

HERBERT W. GOLDBLATT, et al., Appellants,

vs.

TOWN OF HEMPSTEAD.

ORDER NOTING PROBABLE JURISDICTION—June 5, 1961

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

SUPREME COURT. U. S.

Office Supreme Court, U.S.
FILED
APR 7 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960

No. 78

HERBERT W. GOLDBLATT and
BUILDERS SAND AND GRAVEL CORP.,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

MILTON I. NEWMAN
Counsel for Appellants
29 Broadway
New York 6, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1960

No. .....

HERBERT W. GOLDBLATT and
BUILDERS SAND AND GRAVEL CORP.,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

(a) Report of Opinions in Courts Below:

The court of original jurisdiction wrote an opinion (19 Misc. 2d 176) which is set forth at folios 685-729* of the certified Record on Appeal.

The Appellate Division affirmed, without opinion (9 A. D. 2d 941).

In the Court of Appeals there was a majority opinion (four judges concurring), upholding the constitutionality

* All numbers in parentheses refer to pages of the Record on Appeal in Court of Appeals.

of the Ordinance in issue and a dissenting opinion (three judges concurring), reported in 9 N. Y. 2d 101. Both opinions are set forth in the Appendix (Exhibit 1).

A copy of the order of the Court of Appeals, certifying a constitutional question is set forth at folios 772-774 of the Record on Appeal.

The opinion of the Supreme Court of the State of New York (Nassau County) in a companion case between the parties, is set forth in Appendix (Exhibit 2); and the judgment entered thereon is printed in the Appendix (Exhibit 3). A copy of the Order of Remittitur of the New York Court of Appeals is set forth in the Appendix (Exhibit 5) and the judgment of the Supreme Court (Nassau County) is Exhibit 6 of Appendix.

(b) The Jurisdiction of This Court Is Based on the Following:

(i) This action was commenced by a complaint (16-39) which sought an injunction prohibiting appellants from excavating sand and gravel from their property (38 acres) located in the Town of Hempstead (Nassau County, State of New York) on the ground that such excavation violated the provisions of Ordinance No. 16 of the Town of Hempstead, as amended in 1958.

The answer of appellants (40-51) contained denials and also affirmative defenses, *viz.*: that the complaint should be dismissed (1) because of a prior judgment which constituted a bar to the maintenance of the action, and (2) because Ordinance No. 16, as amended in 1958, was unconstitutional since it prohibited all further excavation and, therefore, constituted an unlawful taking of appellants' property without payment therefor, in violation of the due process provisions of the Fourteenth Amendment of the Constitution of the United States and also because it constituted *ex post*

facto legislation, in violation of Article 1, Section 10, Clause 1 of the Constitution of the United States.

(ii) The final order and judgment of the Court of Appeals, affirming the judgment of the Courts below, holding Ordinance No. 16 constitutional, was dated and filed on January 19, 1961. The Notice of Appeal to this Court was served and filed on March 30, 1961, in the office of the Clerk of the Supreme Court (County of Nassau), which is the Court possessed of the record and proceedings in this cause.

(iii) Jurisdiction of the appeal to this Court is conferred by the provisions of 28 United States Code, Section 1257(2). The Court of Appeals of the State of New York is the highest Court of that State and the order and judgment of that Court affirms the constitutionality of a statute which violates the due process provisions of the Fourteenth Amendment and the *ex post facto* provisions of Article 1, Section 10, Clause 1 of the Constitution of the United States.

(iv) Cases sustaining the jurisdiction of this Court include the following:

Pennsylvania Coal v. *Mahon*, 260 U. S. 393;
Panhandle Oil Company v. *State Highway Commission*, 294 U. S. 613;
Dobbins v. *Los Angeles*, 195 U. S. 223;
Hadacheck v. *Los Angeles*, 239 U. S. 394;
Queenside Hills Realty Company v. *Saxl*, 328 U. S. 80;
Paulos v. *New Hampshire*, 345 U. S. 395, 402.

(v) Ordinance No. 16 of the Town of Hempstead (as amended on November 25, 1958) is set forth in full on pages 10-13 of the certified Record on Appeal. The pertinent text of this Ordinance is set forth in the Appendix (Exhibit 4).

(c) Questions Presented by This Appeal

This appeal involves the constitutionality of Ordinance No. 16, as amended on November 25, 1958. Appellants contend that the Ordinance violates the Constitution of the United States in two major respects:

(i) It violates the due process clause of the Fourteenth Amendment of the Constitution of the United States (a) insofar as it takes away appellants' property and business without payment therefor; and (b) because the Ordinance overrules and sets aside vested rights of appellants, "established by a solemn judgment" (*Massingill* v. *Downs*, 48 U. S. 760, 768) rendered by the Supreme Court of the State of New York, County of Nassau on April 5, 1956 (Exhibits 2 and 3 of Appendix), *permitting* appellants to carry on their business of excavating sand and gravel on their property in the very manner now *prohibited* by the said Ordinance; and

(ii) Insofar as the Ordinance provides criminal sanctions and punishment for doing acts which were legal when done, the Ordinance violates the Constitutional provisions prohibiting *ex post facto* laws (Article 1, Section 10, Clause 1 of the Constitution of the United States).

(d) Statement of the Case

The appellant, Goldblatt, is the owner of 38 acres of land located in the Town of Hempstead. The other appellant, Builders Sand and Gravel Corporation (all of whose shares of stock are owned by Goldblatt), was the operator of the business of excavating and selling sand and gravel taken from the land in litigation (18, 19). The property was purchased by Goldblatt's father in 1927 and the business of excavating and selling sand and gravel taken from the

property was carried on from 1927 until 1959, when the judgment of injunction was obtained (306-309, 325, 476).

In 1928, a year after operations began, the excavating had gone below water level and an artificial lake was created, averaging 25 feet in depth (149-152, 307-309, 157, 476). This body of water, therefore, was in existence for 30 years and appellants' excavation operations, exclusively done under water, had been carried on 30 years before the 1958 Amendment of Ordinance No. 16.

From 1927 to 1958, there were no regulations governing appellants' excavating operations under water.

In 1945, Ordinance No. 16 was enacted and provided regulations for the conduct of appellants' excavating operations, such as providing for a six foot wire mesh fence (which now completely surrounds appellants' property) and for degrees of slope, etc. Appellants complied with all these regulations of the 1945 Ordinance (235, 314-16, 319, 527, 528, 532) and continued to conduct their underwater excavating and dredging until 1956, when the appellee-Town decided to put a stop to appellants' operations.

No claim was made that appellants violated any of the *regulatory* provisions of the 1945 Ordinance No. 16. However, the Town brought an action in 1956 in the Supreme Court (Nassau County) to enjoin appellants from continuing their business of excavating sand and gravel on the theory that these activities violated the Zoning Ordinance of Hempstead. After trial, appellants had judgment (Exhibit 3 of Appendix), which expressly provided that appellants had the legal rights of "a prior non-conforming use in the conduct of the sand and gravel business, which may be carried on *on the entire premises* • • • notwithstanding any ordinance of the plaintiff [appellee]". In the opinion written by the Court in that case (Ap-

pendix, Exhibit 2) it was expressly stated: "I find that the defendants [appellants herein] are now and have been since 1927, conducting a prior non-conforming use on the premises and have made such a substantial investment in improvements in the business to warrant a continuation of its non-conforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537."

In 1957, the appellee-Town brought an action to enjoin appellants from operating a concrete-mixing operation in connection with their sand and gravel business. That litigation terminated in an injunction preventing appellants from engaging in the concrete business on the ground that it would constitute an improper extension of their non-conforming use (4 App. Div. (2) 970; appeal denied 4 N. Y. (2) 674).

In 1958, the appellee-Town amended Ordinance No. 16 to accomplish precisely what it failed to accomplish in the 1956 lawsuit, *viz.*: the absolute prohibition of all sand and gravel excavation under water (see Section 4 (h) of the Ordinance).

Since appellants operate the only sand and gravel business in Hempstead by dredging operation (577), it would appear indisputable that the 1958 Amendment was directly aimed at them.

Not only does the 1958 Ordinance overrule the 1956 judgment, but Section 4(j) of the Ordinance (Appendix, Exhibit 4) requires appellants to refill the entire excavation (lawfully made 1927-1958) with "clean non-burnable fill". Approximately 1,000,000 cubic yards of fill have been removed in appellants' 30 year operations (237) so that the cost of refilling would be approximately $1,000,000. The 1958 Ordinance (Section 10) provides for punishment by fine of not more than $500 or imprisonment for

a period not exceeding six months, or both, for each offense and provision is made that "each week's continued violation shall constitute a separate additional violation".

About a year before the Town enacted the 1958 Amendment, prohibiting appellants from all underwater excavating, it also prepared plans for a system of drainage, which included the use of appellants' property (281-300 and Exhibit C).*

The acquisition of appellants' property by the constitutional route of eminent domain was actually discussed by the Town with appellants (Exhibit A and cf. 292, 293, 331). However, instead of using its power of condemnation the Town decided to test the validity of the 1958 Ordinance which would effectively give appellants' property to the Town, without payment. Accordingly, this injunction action was begun in 1959.

Admittedly, appellants' removal of sand and gravel under water is in direct violation of the 1958 Ordinance (Section 4(h)) and, therefore, if the Ordinance is held constitutional, appellants are not only prohibited "unconditionally and finally" from excavating and carrying on their business of "underwater dredging previously conducted on 20 acres of [appellants'] property" (opinion of Van Voorhis, *J.*, Appendix, p. 6a), but they are required to spend $1,000,000 to fill in the excavation "lawfully created", under criminal penalties provided in the Ordinance (Section 10).

Appellants' first pleading (their answer to the complaint (40-51)) raised the constitutional issues involved herein.

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* The dissenting opinion of Judge Van Voorhis takes note of the fact that appellants' property was included in the Town's 1957 drainage plans.

After trial (61-684), judgment was entered (52-60) granting the injunction, based on the holding of constitutionality of the 1958 Ordinance No. 16.

The judgment of the Trial Court was affirmed by the Appellate Division of the Supreme Court, without opinion (757-762).

The appeal was argued in the Court of Appeals in October, 1960, and the Court handed down its order of affirmance in January, 1961. Both the majority opinion and the minority opinion (Appendix, exhibit 1) expressly state that the main issue involved on the appeal is the constitutionality of Ordinance No. 16, as amended in 1958.

The very first sentence of the majority opinion (Appendix, Exhibit 1) is:

> "The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in volation of the due process clause of both the Federal and State Constitutions."

The dissenting opinion concludes (Appendix, p. 10a) that Ordinance No. 16 not only violates the due process clause of the Fourteenth Amendment of the United States Constitution, but also states (Appendix, p. 6a) that the Ordinance "may well be regarded as oppressive and condemned by the constitutional prohibition against *ex post facto* laws (U. S. Const., Art. 1, Sec. 10)".

Prior to the hearing of the appeal in the Court of Appeals, that Court made an order dated April 28, 1960 (772-774), pursuant to Section 588(1)(a) of the N. Y. Civil Practice Act providing that "there be directly involved" a constitutional question.

The foregoing review of the proceedings in the New York Courts—particularly in the Court of Appeals of the State of New York—demonstrates that this Court has jurisdiction of this cause under provisions of 28 U. S. C. Section 1257(2), since (1) there is directly involved the legality of Ordinance No. 16 of the Town of Hempstead, as amended in 1958, under the provisions of the Constitution of the United States and (2) the highest court of the State of New York has sustained the constitutionality of that legislation.

(e) The Federal Questions Are Substantial

(1) There are no disputed issues of fact upon which the ultimate determination of constitutionality of the 1958 Ordinance depends. This Ordinance by its terms (Section 4(h)) immediately and forever prohibits all further excavation on 20 acres of appellants' property. The validity of the Ordinance has been sustained on the premise adopted in the majority opinion that the Ordinance does *not* "proscribe any future excavation", but "merely" provides regulations for excavating. The dissenting opinion finds the Ordinance unconstitutional under the holding of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416, that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking • • • ."

The fact that the Ordinance *does* prohibit and *does* "proscribe future excavation" is conclusively demonstrated, as follows:

Appellants' excavating operations were entirely and wholly under water. In other words, appellants' excavation is accomplished by hydraulic dredging under water (307, Exhibits 2, 3, 6A, 6B, 6F, 6N, and 6R). This method of dredging sand and gravel under the artificial lake, cov-

ering 20 acres, had been employed for 30 years when the 1958 Ordinance was enacted.

Section 4(h) of the 1958 Ordinance (Appendix, Exhibit 4) provides:

> "No excavation shall be made below two feet *above* the maximum ground water level at the site" (Emphasis added).

Since appellants' excavations are admittedly 25 feet (average) *below* "maximum ground water level", it is readily apparent and cannot be denied (1) that appellants' operations violate Section 4(h) of the 1958 Ordinance, (149-152, 155-157) which prohibits all excavation "below 2 feet *above* maximum ground water level" and (2) that all appellants' future operations are prohibited; and the judgment so provides (58).

Not only does Section 4(h) thus prohibit all further excavation under the artificial lake but Section 4(j) of the 1958 Ordinance (and the injunction (59) which sustains the Ordinance) requires appellants to refill the entire excavation, covering 20 acres "with clean, non-burnable fill". Section 4(j) (Appendix, p. 15a) provides:

> "When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance • • • such pit or part thereof shall be immediately refilled with clean, non-burnable fill • • • and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads".

As pointed out previously, more than 1,000,000 cubic yards of sand and gravel have been removed from the acreage in litigation (237) and the $1,000,000 cost of re-

filling would make it impossible to bring the property back to its 1927 condition. Appellants will have to default in payment of land taxes and the appellee-Town will end up by acquiring appellants' property, without any payment therefor. See opinion of Van Voorhis, *J.* (Appendix, p. 8a):

> "* * * the purpose [of the 1958 Ordinance] was expropriation rather than regulation".

Although the trial court erroneously prevented appellants from showing the full value of their property and improvements affected by the Ordinance, the evidence which was admitted showed a gross annual business of appellants in excess of $200,000, a capital investment of approximately $241,000 and an assessed valuation of $66,000 (457 and Exhibit I). This is the property of appellants which has been taken, without due process.

It is not denied that appellants' excavation operations constituted a legal, non-conforming zoning prior use of appellants' property. This non-conforming use, often described as a "vested right," was adjudicated in the 1956 litigation (Appendix, Exhibits 2 and 3), in which the appellee-Town sought to prevent appellants' underwater excavating. As pointed out by Judge Van Voorhis (Appendix, p. 8a): the 1958 Amendment to the Ordinance No. 16 was "designed to accomplish what the 1956 lawsuit had failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance."

(2) Beyond the immediate result to appellants in wiping out their very valuable rights in 38 acres of land located in Nassau County, New York, the issue presented in this case, viz.: eliminating a non-conforming use by legislation, is a matter of major concern throughout the country. No one will dispute the propriety or desirability of the pur-

pose expressed in the majority opinion that "there must be progress" and that sometimes "private interests * * * must yield to the good of the community." However, the issue in this case, which has confronted other growing communities throughout the country, is how this elimination of non-conforming uses may be accomplished constitutionally and without violating the due process clause of the Fourteenth Amendment. The subject has been the source of much litigation throughout the country and has been the topic of numerous legal commentaries and writings, many of which are considered in the majority and dissenting opinions of the Court of Appeals in *Harbison* v. *City of Buffalo*, 4 N. Y. 2nd 553 (1958).

The learning on the subject is summarized in an article in 44 Cornell Law Quarterly 450 (1959) entitled "Elimination of Non Conforming Use by 'Amortization'," in which the author concludes (p. 453): "The law is settled that retroactive zoning ordinances and ordinances requiring immediate cessation of prior non conforming uses are unconstitutional because they are too harsh and unfair." See also: "Amortization of Non Conforming Use Under Regulatory Guise" (7 Syracuse Law Review 158).

Current litigation in numerous jurisdictions (reported in the *Harbison* opinions) discloses the attempt of Legislatures to eliminate non-conforming uses by the inclusion of amortization provisions. Whatever be the validity of such statutory provisions, the fact is that in the instant case no provision is made for amortization or for any other payment to appellants for the elimination and confiscation of their rights. To the contrary, not only are all future operations prohibited but appellants are required to fill in an excavation extending over 20 acres of their property, containing a lake with an average depth of 25 feet.

(3) The appellee-Town does not argue with the fundamental principle (*People* v. *Miller*, 304 N. Y. 105; *Somers* v. *Camarco*, 308 N. Y. 537; *Harbison* v. *Buffalo*, 4 N. Y. (2) 553) that non-conforming uses may not be eliminated constitutionally without payment therefor. The contention of the Town, which was adopted in the majority opinion of the Court of Appeals, is (1) that the ordinance does *not* prohibit but only *regulates* appellants' operations, and (2) there is no confiscation or taking of appellants' property because the prohibition against excavating and the requirement of filling up the excavation applies only to the 20 acres underwater and, therefore, appellants may continue to excavate on their 18 acres not underwater. We shall now show that both these contentions are untenable.

(4) In support of its conclusion that 1958 Ordinance No. 16 does not "proscribe" or prohibit appellants' activities but only provides rules and regulations, enacted under the Town's police powers, the majority opinion cites *South Carolina Highway Dept.* v. *Barnswell Bros.*, 303 U. S. 177 (a case involving *regulation* of trucks on highways) and also points out that this Court has sustained *regulatory* provisions involving "pre-existing uses," citing *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, and *Engelsher* v. *Jacobs*, 5 N. Y. 2d 370 (cert. den. 360 U. S. 902).

In sustaining the Ordinance the majority opinion states that the Ordinance "merely conditions future operations upon the issuance of a permit from the Town of Hempstead and the correction of certain violations of the ordinance." This analysis of the Ordinance cannot possibly be reconciled with the express and unambiguous prohibitory language of Section 4(h). There is no way appellants can comply with the prohibition of underwater operations provided for (in Section 4(h) of the Ordinance) except by *not* excavating underwater. This is a situation of *total* prohibition, such

as existed in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393,—not "merely" regulation of excavating activities.*

The decisions in the *Saxl* and *Jacobs* cases (relied on in the majority opinion) are totally inapplicable because in those cases the Ordinances involved "were truly 'regulatory' ordinances which did not operate to confiscate and prohibit absolutely" (Appendix, p. 6a). In the *Jacobs* case the ordinance regulated the number of beds which could be put in hospital rooms of certain sizes. There was nothing in the ordinance which prevented the hospital from carrying on its hospital business. Likewise, in the *Saxl* case this Court sustained state legislation regulating and requiring such things as an automatic sprinkler system in lodging houses. However, the ordinance in the *Saxl* case did not prohibit the business of conducting a lodging house. The type of prohibitory provisions struck down in the *Pennsylvania Coal* case was not present in *Saxl*, which does not even cite the *Pennsylvania Coal* case.

The opinion in the *Saxl* case cites *Hadacheck* v. *Los Angeles*, 239 U. S. 394, which the majority opinion also cites. In *Hadacheck*, this Court (239 U. S. at pp. 411 and 412) expressly pointed out the difference between a prohibition of the use of one's land (the situation in our case) and the prohibition of a business located on the land—which business could be physically moved to another location. The *Hadacheck* case involved a brick-making factory located on property containing clay used in the making of

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* The fact of total prohibition contained in Section 4 (h) of the Ordinance has been so difficult—nay impossible—to answer that the appellee-Town in one of its briefs argued that appellants could use the man-made lake for boating and swimming uses. Since this argument overlooked the requirement of Section 4 (j) that the lake be refilled and since the argument was contradictory to the Town's *assumed* (but false) major premise that water is dangerous, the argument was later discontinued.

the bricks. This Court, noting (p. 410) that in *Ex parte Kelso* (147 Cal. 609) a statute prohibiting the maintenance of a rock quarry within the City of San Francisco was held unconstitutional (as a prohibition against the use of the real property itself), pointed out that the legislation attacked contained "no prohibition of the removal of brick clay" (p. 411) but only prohibited the manufacturing of brick. This Court itself posed the quaere (p. 412) whether a total prohibition of removal of the clay from the property would be a violation of the due process clause, as was held in *Ex parte Kelso.*

When the quaere raised in *Hadacheck* was later litigated, it was held in *Terrace Park* v. *Errett,* 12 Fed. 2d 240, 243 (C. A. 6, 1926; cert. den. 273 U. S. 710) that an ordinance which would have prohibited further excavation of sand and gravel from one's property was unconstitutional. The Court in the *Errett* case, citing the *Hadacheck* case, said (p. 243):

> "There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content. This difference was recognized by the Supreme Court in *Hadacheck* v. *Los Angeles,* 239 U. S. 394."

(5) The majority opinion of the Court of Appeals affirmed the legality of the 1958 Ordinance on the rule of "presumption of constitutionality" in the mere enactment of the statute. However, in our case this presumption was overcome (a) by the undisputed fact that appellants had a vested right of a non-conforming use which the 1958 Ordinance prohibited and wiped out, without payment, and (b)

by the undisputed fact that there was no proof of any danger, peril, nuisance or the like in appellants' operations which might have been the basis for sustaining even regulation—let alone prohibition—thereof.

The majority opinion does not point out any such danger, peril or nuisance involved in appellants' operations. And there was no proof of any such danger, peril or nuisance.

In stating its conclusion of legality, the majority opinion referred to the number of homes and schools located in the neighborhood of appellants' property. In the first place, appellants "did not bring their business into a residential area; [appellants'] neighbors voluntarily came into this area where [appellants'] operations and the artificially created lake were evident and obvious" (Appendix, p. 4a). In any event, the existence of the homes and schools *per se* constitutes no basis for a finding of "danger to the public" (*Panhandle* v. *State Highway*, 294 U. S. 613, 619).

There was no proof of a single accident, injury or harm to any person on appellants' premises in the 30 years of continuous hydraulic operations. There was no proof of even a single trespasser. There was no proof of any cave-ins or any property damage to neighboring homes or property; or that any current damage to surrounding property existed because of appellants' dredging. To the contrary, the uncontradicted proof was that there never had been any "cave-in or tearing away of the bank" or slopes (464-469); and there was uncontradicted affirmative testimony that the bank or slope surrounding the water is "stable" (469).

In lieu of testimony *re*: danger, the Trial Court and the majority opinion of the Court of Appeals refer to "obvious dangers" and "common knowledge" of such alleged "obvious dangers." The fact is that it is *not* "obvious" and it is

not "common knowledge" that appellants' operations—whatever the situation may be in the operations of others—constitute any "grave threat to human life and to property" or constitute a public nuisance. As noted by Judge Van Voorhis: contrary to the unfounded assumption of "nuisance" made by the Trial Court and majority Court of Appeals' opinion, appellee's counsel stated on the oral argument in the Court of Appeals, that he did "not contend that this condition [of appellants' operations] amounts to a nuisance" (Appendix, p. 8a).

There is nothing inherently dangerous or evil about appellants' business nor about excavating under water. There was no proof that the water existing on appellants' 20 acres presented a dangerous condition.* This artificial lake is completely surrounded by 7,000 lineal feet of 6 foot wire fence topped by 3 strands of barbed wire, in good condition, constructed in accordance with the 1945 regulatory ordinance. As pointed out in the dissenting opinion (Appendix, p. 10a) there was evidence of "ponds, drainage basins, sumps and other conditions of open water that have gone unmolested which appear to be more dangerous than the subject property because not surrounded by fences."

The excavating and selling of sand and gravel is an important and legitimate business. The 1959 statistics of the U. S. Bureau of Mines show that this business totalled more than $700,000,000, more than $27,600,000 in New York alone. In the "declaration of policy" of the 1958 Ordinance (Article I, Section 1), it is stated that the Ordinance was "enacted to suppress" such "lawful business" (Appendix, p. 9a) conducted by appellants without peril or danger to the community. The Court of Appeals itself had previously

* The argument of appellee-Town, now discarded (see footnote *supra* p. 14), that appellants could use the water for boating, swimming, etc., for use by children is contrary to the theory (not fact) of water being dangerous, *per se*.

recognized that excavation of sand and gravel is a perfectly legitimate enterprise, and that a non-conforming use, consisting of sand operations, might not be eliminated by legislation, without payment therefor. *Town of Somers* v. *Camarco*, 308 N. Y. 537.

(6) In addition to the contention that the 1958 Ordinance is only "regulatory," appellee also argued that the requirement of the 1958 Ordinance (Section 4(h)) was not unconstitutional because the prohibition against excavating underwater involved only the 20 acres of appellants' 38 acres underwater and left 18 acres (not yet under water) available for excavation. This argument which was adopted, *in toto*, in the majority opinion (which stated: "There are approximately 18 acres which are available for excavation") is wholly insufficient to sustain the taking of appellants' 20 acres. First, the equipment of appellants, used in the underwater dredging, is actually located on these 18 acres not underwater, and therefore, excavation on these 18 acres is not available (see Exhibits 2, 6G and 6P). Second, the requirement that no excavation shall proceed to a depth lower than "two feet above maximum ground water level" (Section 4(h)) means that there can be no excavation on these 18 acres because these 18 acres are practically at water level (Exhibit 3 of Record on Appeal). More important: the argument that the taking of 20 acres is no taking because 18 acres remain, is a *non-sequitur*, erroneous in logic and in law.

Appellants' excavation business is the only one remaining in the Town of Hempstead. So that "it would appear that the Ordinance was aimed directly at them" (Appendix, p. 5a). To the extent that the legislation is directed against appellants, and since there is no showing that the excavation operations now are different from, or more dangerous then the operations conducted over the 30 year

period, the holding in *Dobbins* v. *Los Angeles*, 195 U. S. 223 is applicable.

(7) If we now assume, *arguendo*, that the political aim of this legislation (occasioned by "pressure groups" who "succeed in obtaining favorable action from a municipality," *Harbison* v. *Buffalo*, 4 N. Y. 2d, at p. 567) may have a desirable purpose or end, i.e., eliminating appellants' use of their property in excavation underwater, it certainly would not follow that this may be accomplished without paying therefor. Mr. Justice Holmes said in the *Pennsylvania Coal* case (260 U. S. at p. 416):

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Mr. Justice Holmes stated (p. 413) that the "constitutional way" was by the "exercise of eminent domain and compensation". Certainly the legislation in the *Pennsylvania Coal* case which was enacted to prevent underground coal mining, considered (by the highest Pennsylvania Court, 274 Pa. 489) to be hazardous to structures and homes located on the surface, concerned a situation much more dangerous than the underwater dredging involved in our case.

See also *Panhandle* v. *State Highway*, 294 U. S. 613, 619 where the Court, quoting the *Pennsylvania Coal* case, again points out that "condemnation" is the constitutional way of accomplishing changes believed to be for the "public welfare". See also *Berman* v. *Parker*, 348 U. S. 26, 36; *Armstrong* v. *United States*, 364 U. S. 40, 48; and 10 Syracuse Law Review 214.

As we previously noted, the appellee-Town had discussions with appellants concerning condemnation of appellants' property, but instead of exercising its power of eminent domain, the Town enacted the 1958 legislation, accomplishing the same purpose without paying for appellants' property. The record in this case sustains the conclusion of Judge Van Voorhis (Appendix, p. 18a) that the "object" of the 1958 Ordinance was "not to promote public health or safety [there is no evidence to sustain any such purpose] but to end the operation of this business under the guise of regulation."

We know of no case where a legislature has so directly eliminated and done away with an adjudicated non-conforming use, without any payment therefor. The most any legislature has previously done has been to eliminate non-conforming uses by providing for amortization of investment over a period of time. See *Harbison* v. *Buffalo*, 4 N. Y. 2d, 553 at p. 567. See also *Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540.

(8) In addition to the fact that the 1958 Ordinance is not a *bona fide* exercise of police power, but rather is prohibitory and confiscatory legislation without legal justification, the Ordinance also violates two additional principles of constitutional law: (a) the legislation overrules and wipes out "vested rights" which appellants have in the judgment obtained in the 1956 litigation between the parties (Appendix, Exhibit 3) and (b) the legislation (Section 10) makes criminal an act, viz: excavating underwater, which was lawful when done.

(a) Insofar as Ordinance No. 16 prohibits appellants from doing exactly what appellants were authorized and permitted to do in the 1956 judgment, the ordinance is contrary to the legal principle of constitutional law, stated

in *McCullough* v. *Virginia*, 172 U. S. 102, 123: "It is not within the power of a legislature to take away rights which have once been vested by a judgment". In *Massingill* v. *Downs*, 48 U. S. 760, 768, this Court held • • • "no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment." See also *Worthen Co.* v. *Thomas*, 292 U. S. 426, 431, 432; *Worthen Co.* v. *Kavanaugh*, 295 U. S. 56, 60.

There is nothing that happened with respect to appellants' operations between 1956 (when appellants' obtained their judgment (Appendix, p. 13a) and 1958 (date of Ordinance) which showed or even indicated appellants' operations had changed or became more dangerous.

(b) Finally, Article I, Section 10, Clause 1 of the United States Constitution, prohibiting *ex post facto* laws, has been violated insofar as Section 10 of the 1958 Ordinance provides that any violation shall be punishable by serious fine or imprisonment or both and that each week's "continued violation shall constitute a separate additional violation." Until this ordinance was enacted, underwater excavation was not only legal because not prohibited by statute, but was judicially and expressly approved and permitted in the 1956 judgment (Appendix, exhibits 2 and 3). The 1958 statutory provisions for fine and imprisonment (Section 10) for conducting such operations (Section 4(h)) and for failing to comply with Section 4(j) of the ordinance (which requires that the 20 acres be re-filled with 1,000,000 cubic yards of fill which had theretofore been legally removed) constitute a violation of Article I, Section 10, Clause 1 which provides: "No state shall • • • pass any • • • ex post facto law • • • ." *Calder* v. *Bull*, 3 Dallas (U. S.) 386, 390.

In *Burgess* v. *Salmon*, 97 U. S. 381, this Court held unconstitutional, as *ex post facto* legislation, a statute which

provided punishment, "criminally and civilly" for an act which was not illegal when committed, although in that case civil punishment was involved in the action brought by Government. The issue before this Court was stated as follows (p. 382): "The case presents but a single point: Can a manufacturer be punished, criminally and civilly, —*civilly here*,—for the violation of a statute, when the statute was not in force at the time the act was done?"

We believe that the dissenting opinion (Appendix, pp. 4a-10a) (in which 3 judges joined) correctly concludes that the 1958 amendment of Ordinance #16 falls within the ambit of *ex post facto* legislation. The majority opinion does not consider this issue.

It is respectfully submitted that the judgment below be reversed; or in the alternative that a plenary consideration of the constitutional issues involved in this cause be allowed by this Court.

Respectfully submitted,

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Appendix (Exhibit 1) Majority Opinion of Court of Appeals of the State of New York

TOWN OF HEMPSTEAD, Respondent, *v.* HERBERT W. GOLDBLATT et al., Appellants.

Decided January 19, 1961.

BURKE, J. The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in violation of the due process clause of both the Federal and State Constitutions.

The defendants seek to revise a judgment of the Appellate Division unanimously affirming a judgment of Special Term upholding the constitutionality of the ordinance and enjoining the defendants from conducting sand mining and excavation on certain property in the Town of Hempstead until a permit has been issued and certain violations of the ordinance have been corrected. They contend that the ordinance cannot be sustained as a valid exercise of police powers and that it violates defendants' vested rights in an established nonconforming use.

Since the courts below have unanimously found that the defendants' proof failed to overcome the presumption of constitutionality and to establish the unreasonableness of the regulations, we may not hold that the ordinance which is an exercise of the town's statutorily delegated police power is invalid, unless there is no justification on "any state of the facts". (*United States* v. *Carolene Prods. Co.*, 304 U. S. 144, 154.)

The sand and gravel pit in question lies in the midst of a densely populated residential area. Included within a radius of 3,500 feet are more than 2,200 homes and 4 schools with an enrollment of 4,500 children. The pit itself occupies

a 38-acre tract of which approximately 20 acres is beneath an artificial lake with an average depth of 25 feet. In order to provide protection against the danger of cave-ins, falls, drownings and water pollution, the ordinance makes provision for setbacks, degrees of slope, barricades, fences, lights, retaining walls and maximum ground water level. Neither the injunction granted nor the ordinance proscribes any future excavation. The injunction merely conditions future operation upon the issuance of a permit from the Town of Hempstead, and the correction of certain violations of the ordinance. There are approximately 18 acres which are available for excavation. The hazards to both life and property accompanying the uncontrolled operation of these pits are common knowledge, and their restraint need not await an event.

The minimal safety standards currently required by the Town of Hempstead have not been demonstrated under the circumstances here to be an unreasonable means to accomplish this end. Upon this record a threat to the community's welfare may at least be said to be "reasonably apprehended". (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219.) "It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining [case cited]. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community." (*Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410.) It is not the function of the courts but of legislators to determine the "reasonableness, wisdom and propriety" of the regulations needed to

protect the community (*South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 191), and their regulatory power, as the United States Supreme Court has pointed out, governs pre-existing uses (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. denied, 360 U. S. 902). Recognizing, therefore, that this court may not question the need for the legislation (*Olsen* v. *Nebraska*, 313 U. S. 236, 246) where there is found, as here, a rational basis for the legislative choice and no factual support for declaring it arbitrary (*Lincoln Bldg. Associates* v. *Barr*, 1 N. Y. 2d 413, 418-420), we do not believe that this ordinance can be declared as a matter of law to go beyond regulation to a degree which would impair its validity.

The judgment appealed from, therefore, should be affirmed, with costs.

Dissenting Opinion of Court of Appeals

VAN VOORHIS, J. (dissenting). Defendants appeal as of right from a judgment upholding the constitutionality of Ordinance No. 16 of the Town of Hempstead, and enjoining the defendants from operating a sand and gravel pit until a permit has been issued by the Town of Hempstead, and certain violations of the said ordinance have been corrected. The defendant, Goldblatt, is the owner of 38 acres of land located in the Town of Hempstead, which is the property involved in this litigation. The other defendant, Builders Sand and Gravel Corp., is the operator of the business of excavating and selling the sand and gravel taken from the land. The property was purchased by Mr. Goldblatt's father in 1927 and the excavation and sale of sand and gravel has been carried on since 1927. Within a year after operations began, the excavation had gone below water level and an artificial lake was created, averaging now approximately 25 feet in depth.

The entire premises of defendant Goldblatt are surrounded by 7,000 lineal feet of a 6-foot chain-link fence, topped by 3 strands of barbed wire. The fence was built and the gravel pit was operated in accordance with a 1945 ordinance and is admittedly in conformity therewith.

When the 38 acres of land owned by defendant Goldblatt were purchased and dredging operations began in 1927, the surrounding property was mainly farm land. The first provision for residential zoning of property was enacted in January, 1930. Thereafter and during the time defendants continued their dredging operations, the surrounding area became heavily populated. Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants' operations and the artificially created lake were evident and obvious.

In 1956 the plaintiff town brought to trial its first legal proceeding to terminate the defendants' dredging operations. That was a suit in Supreme Court, Nassau County, to restrain defendants from operating on the theory that defendants' dredging operations constituted a violation of the Zoning Ordinance of the Town of Hempstead.

It was held that defendants had a legal right, consisting of a prior nonconforming use, to continue their excavation and operations under water on their "entire premises • • • notwithstanding any Ordinances of the plaintiff". The opinion of Justice HILL states: "I find that the defendants are now and have been since 1927 conducting a prior nonconforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant a continuance of this nonconforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537." No appeal was taken from the judgment entered upon the opinion of Mr. Justice HILL.

In 1958 Ordinance No. 16 was amended to prohibit all excavation below water level and to require the filling in of excavations previously made. Defendants now conduct the only sand and gravel business by dredging in Hempstead and it would appear that the ordinance was aimed directly at them.

In the 1956 litigation before Mr. Justice HILL, the town did not bring into litigation or rely on the provisions of the original 1945 Ordinance No. 16 for the reason that defendants' operations complied with the regulatory provisions of the 1945 ordinance. It was not until the 1958 amendment of the ordinance that excavation below ground water level was prohibited.

The plaintiff township would distinguish an invalid retroactive zoning ordinance attempting to eliminate a "nonconforming use" (*Matter of Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553; *Town of Somers* v. *Comarco*, 308 N. Y. 537) from a

"regulatory" ordinance which regulates the nonconforming use in the interest of public health and safety (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. denied 360 U. S. 902). Both lower courts applied this distinction and held that the 1958 ordinance was a proper police power regulation designed to abate a dangerous situation.

While in a proper case the distinction is a valid one, the record here indicates a systematic attempt to force the defendants out of business. The decision below has that in practical effect. A condition of continuing the business requires defendants to fill the existing excavation at a cost in excess of $1,000,000. If this is not done, the ordinance purports to render defendants criminally liable for separate misdemeanors during each week until the pit is refilled. This particular portion of the ordinance, we may note, in addition to other objectionable features, serves, in effect, to render criminal an act "innocent when done" (*People* v. *Oliver*, 1 N. Y. 2d 152, 158). In consequence it may well be regarded as oppressive, and condemned by the constitutional prohibition against ex post facto laws (U. S. Const., art. I, § 10). In other words, under the challenged ordinance as it now stands, defendants are susceptible of criminal prosecution for not filling in the excavation (to the extent of approximately 1,000,000 cubic yards) lawfully created over the years prior to enactment of the ordinance, by means of the lawful removal of sand, and in the course of prosecuting a lawful business.

A reading of the *Saxl* and *Engelsher* cases (*supra*) cited by the respondent town indicates that they were truly mere "regulatory" ordinances which did not operate to confiscate and prohibit absolutely. Since Ordinance No. 16 virtually eliminates the nonconforming use and prohibits unconditionally and finally all underwater dredging previously conducted on 20 acres of defendants' property, the theory

of "regulation" cannot reasonably be sustained. The following observation of Mr. Justice HOLMES in *Pennsylvania Coal Co.* v. *Mahon* (260 U. S. 393, 415-416) is applicable: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Similar language was used by this court in *Arverne Bay Constr. Co.* v. *Thatcher* (278 N. Y. 222, 231).

In *People* v. *Calvar Corp.* (286 N. Y. 419) this court stated (p. 421): "Forceful argument may be made that a general and complete prohibition of such use of property, even where such use might be permitted without causing substantial injury to the community, would be unreasonable. That question must await determination until it arises. We express no opinion upon it. In this case there has been no such complete and absolute prohibition."

We think that this case falls within the ambit of the question left unanswered in the *Calvar* case.

Furthermore, in the *Harbison* case (4 N. Y. 2d 553, *supra*), it was held that the value of the investment in the property was relevant in determining the validity of an attempted elimination of a nonconforming use. In this case, defendants attempted to show the value of their investment but the trial court ruled against the introduction of such evidence. Such evidence was important and admissible under the majority ruling in the *Harbison* case and also under the doctrine in *People* v. *Miller* (304 N .Y. 105, 108, 109) where this court held that unless the "loss to the owner" of a prior nonconforming use is "slight and insubstantial" it could not be wiped out by an ordinance (see, also, *Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540,

supra). The record does indicate, however, the substantial nature of defendants' business.

In *Trio Distr. Corp.* v. *City of Albany* (2 N. Y. 2d 690, 696), we held that an ordinance was invalid "prohibiting the conduct of an occupation under the guise of regulation."

Upon the argument the attorney for plaintiff-respondent said in answer to questioning that he does not contend that this condition amounts to a nuisance, but that excavations of this kind are subject to regulation by ordinance under the police power. Of course they are, in the interest of public health and safety, but an examination of the clauses in the 1958 amendments to this Ordinance No. 16 supports the contention that it was directed at this single operation and designed to accomplish what the 1956 lawsuit had failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance. The object is not to promote public health or safety, but to end the operation of this business under the guise of regulation.

The very circumstance that this gravel pit was conducted in conformity with the 1945 regulatory ordinance was exploited by the town to trap defendants by changing the permitted grade of the declining angle of the slope of the pit from 45 to 30 degrees, and by requiring a concrete curb beneath the 7,000 feet of fence which was built according to the 1945 requirement. No object in the installation of this concrete curbing has been shown except that it would put defendants to the expense of removing the fence, laying the concrete and constructing a new fence. This, along with the prohibition of excavation below water level or more than 10 feet below the highway level, and the extension from 10 to 20 feet of the permitted distance between the excavation and the property line and the retrospective requirement of refilling all that had been excavated since 1927, shows that the purpose was expropriation rather than regulation.

In 1959 the United States Bureau of Mines statistics show that the business of excavating and selling sand and gravel in the country totalled more than $700,000,000 and more than $27,600,000 in New York State alone. Much must have been spent on Long Island where, respondent itself asserts, building operations have proceeded at a high rate in the Town of Hempstead. There is nothing inherently dangerous or evil about this business, nor about excavating under water, which, especially in this area, has been a vital necessity. The minutes of the trial before Justice HILL, in evidence here, show that the gross annual business of defendants was in excess of $200,000 and that their capital investment was approximately $241,000. All of this is important as indicating that this is a lawful business which the "Declaration of Policy" in the ordinance says it was enacted to suppress. The regulatory provisions of the ordinance adopted in 1945, it is virtually conceded, were adequate to furnish protection against whatever hazards were created by the sand and gravel pits. That appears to have been drawn in substantially the same form as in the case of towns generally in the County of Nassau. Nor does the circumstance alter the case that there are 18 more acres in the tract which the photographs show to be entirely occupied by the machinery used in the operation of the sand and gravel pit. Even if the land on which the machinery is located could be utilized for excavation, it would not help the ordinance which unlawfully prevents the operation of a lawful business on the 20 acres. It may be noted that, although the trial court excluded evidence of the value of the installations, the assessed valuation is in evidence as $66,000.

In endeavoring to close this pit the town says much about the safety of children. They are protected by the regulatory provision of the ordinance as it was enacted in 1945 according to a pattern prevalent throughout the county.

The one drowning mentioned in the entire history of this pit, which is not shown by the record but does appear, we are told, from the police reports, happened in 1944 before the enactment of any ordinance requiring a fence to surround the excavation. The evidence indicates the existence of ponds, drainage basins, sumps and other conditions of open water that have gone unmolested which appear to be more dangerous than the subject property because not surrounded by fences. The presence of violations of the ordinance elsewhere would not, of course, prevent its enforcement, but it confirms that the object here was not regulation but prohibition of the conduct of this business. There are some hazards in the operation of any legitimate business. Automobiles are not kept off the highways for the reason that children as well as adults are occasionally injured or killed by them.

The judgment appealed from should be reversed and the complaint dismissed, with costs in all courts.

Chief Judge DESMOND and Judges DYE and FULD concur with Judge BURKE; Judge VAN VOORHIS dissents in an opinion in which Judges FROESSEL and FOSTER concur.

Judgment affirmed.

Appendix (Exhibit 2) Opinion in Prior Litigation

Dated March 8, 1956

TOWN OF HEMPSTEAD,

v.

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.

By this action plaintiff, Town of Hempstead, seeks an injunction restraining defendant from the operation of a sand and gravel business on premises described in the complaint as a violation of the town zoning ordinance. Defendants' counterclaim for a determination that the ordinance is invalid insofar as it restrains them from the operation of a sand and gravel business on the premises.

Defendants or their predecessors have owned and conducted a sand and gravel business on the 38 acre parcel described in the complaint since 1927. The first zoning ordinance of the town was adopted in 1930. I find that the defendants are now and have been since 1927 conducting a prior non-conforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant the continuance of this non-conforming use, see People v. Miller, 304 N. Y. 105; Town of Somers v. Camarco, 308 N. Y. 537.

I, further, find that there has been a substantial use of the entire premises to entitle defendants to continue their operations, *in futuro*, as to the entire premises.

The complaint is dismissed and the counterclaim granted insofar as it seeks a determination that the prior non-conforming use can be carried on on the entire premises with costs to defendants.

The foregoing constitutes the decision of the court pursuant to the provisions of the Civil Practice Act.

Settle Judgment.

HILL
J. S. C.

Appendix (Exhibit 3) Judgment in Prior Litigation

At a Special Term, Part I thereof, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Nassau County Courthouse, Old Country Road, Mineola, New York, on the 5th day of April, 1956.

Present:

HON. L. BARRON HILL,

Justice.

7006/54

TOWN OF HEMPSTEAD,

Plaintiff,

against

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.

Defendants.

The issues in this action having duly come on to be heard before this Court at a Special Term, Part I thereof, held at the Nassau County Courthouse, Mineola, New York, on the 14th and 15th days of February, 1956, and the plaintiff having appeared by John A. Morhous, Esq., by Edward M. Kolbell, Esq., of counsel, and the defendants having appeared by Edward M. Miller, Esq., and the allegations and proofs of the respective parties having been duly heard and considered, and the Court having made its decision in writing, dated March 9, 1956, and having in its aforesaid decision directed the dismissal of the complaint and having granted judgment to the defendants on the counterclaim

insofar as it sought a determination on the non-conforming use, with costs to the defendants, and the costs and disbursements of the defendants being the sum of $78.38, as taxed by the County Clerk of the County of Nassau, and on motion of Edward M. Miller, attorney for the defendants, it is

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same hereby is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants have a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises described in the complaint, notwithstanding any Ordinances of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, of Newbridge Avenue, East Meadow, New York, recover of the plaintiff, of Town Hall, Front Street, Hempstead, New York, the sum of $78.38, costs and disbursements, as taxed, and that the defendants have execution therefor.

Judgment this 5 day of April, 1956.

Enter

HILL.
Justice Supreme Court

Appendix (Exhibit 4) Pertinent Provisions of Ordinance 16

Section 4(h) of Ordinance No. 16, as amended on November 25, 1958, provides:

> No excavation shall be made below two feet above the maximum ground water level at the site.

Section 4(j) provides:

> When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance or the removal of earth from any such part has been discontinued or abandoned or the permit for such removal has expired, such pit or part thereof shall be immediately refilled with clean, non-burnable fill containing no garbage, refuse, offal or any other deleterious or unwholesome matter and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

Section 10 provides:

> *Penalties.* For any and every violation of the provisions of this Ordinance, the owner, general agent, or contractor of a building on premises where such violations have been committed or shall exist, and the lessee or tenant of the premises where such violation has been committed or shall exist and the owner, general agent, contractor, lessee or tenant of any part of the premises in which part of said violation has been committed or shall exist, and the general agent, architect, engineer, surveyor, building contractor or any other person who knows, permits, takes part or assists in any such vio-

lation, or who maintains any premises in which any such violation shall exist, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than $500.00 or imprisonment for a period not exceeding 6 months for each such offense, or by both such fine and imprisonment. Each week's continued violation shall constitute a separate additional violation.

Appendix (Exhibit 5) Order of Remittitur of New York Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, *SS.*:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 19th day of January, in the year of our Lord one thousand nine hundred and sixty-one, before the Judges of said Court.

WITNESS:

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR

January 19, 1961—No. 272

TOWN OF HEMPSTEAD,
Respondent,

v.

HERBERT W. GOLDBLATT & ano.,
Appellants.

BE IT REMEMBERED, That on the 20th day of August in the year of our Lord one thousand nine hundred and sixty, Herbert W. Goldblatt & ano., the appellants in this cause, came here unto the Court of Appeals, by Baar, Bennett & Fullen and Edward M. Miller, their attorneys, and filed

in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Town of Hempstead, the respondent—in said cause, afterwards appeared in said Court of Appeals by John A. Morhous, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Milton I. Newman, of counsel for the appellants, and by Mr. William C. Mattison, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon
Clerk of the Court of Appeals
of the State of New York

Appendix (Exhibit 6) Judgment of Supreme Court of New York (Nassau Co.) Entered on Order of Remittitur

JUDGMENT

File No.

4811/1959

SUPREME COURT—NASSAU COUNTY

TOWN OF HEMPSTEAD,

Plaintiff,

—against—

HERBERT W. GOLDBLATT and BUILDERS SAND & GRAVEL CORP.,

Defendants.

The above named defendants having appealed to the Court of Appeals from the judgment of affirmance of the Appellate Division of the Supreme Court in and for the Second Judicial Department entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960, and the Court of Appeals having heard said appeal and having ordered and adjudged that the judgment so appealed from be affirmed with costs and the Remittitur from the said Court of Appeals having been filed in the office of the Clerk of the County of Nassau and the order having been entered thereon on the 15th day of February, 1961 making the order of the Court of Appeals the order of this Court and directing the entry of a judgment of

affirmance herein with the costs of said appeal to be taxed in favor of the plaintiff against the defendants.

Now, on motion of Richard P. Charles, Special Counsel to John A. Morhous, Town Attorney of the Town of Hempstead, Town Hall, Hempstead, N. Y., it is

ADJUDGED that the judgment of affirmance entered in the office of the Clerk of the County of Nassau on the 21st day of January, 1960 be affirmed; and it is further

ADJUDGED that plaintiff, Town of Hempstead, Town Hall Hempstead, N. Y. do recover of and have judgment against defendants, Herbert W. Goldblatt, 127 Stevens Ave., Hempstead, N. Y. and Builders Sand & Gravel Corp., Newbridge Ave., East Meadow, N. Y. in the sum of $203.63 the costs and disbursements as taxed by the Clerk of this Court and that petitioners have execution therefor.

Dated
Feb. 21, 1961

FRANCIS J. ANDERSON
Clerk

Office-Supreme Court, U.S.
FILED
MAY 5 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM 196[illegible]

No. ~~[illegible]~~ 78

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

RICHARD P. CHARLES,
Special Counsel to
John A. Morhous,
Attorney for Appellee,
32 Court Street,
Brooklyn, N. Y.

RICHARD P. CHARLES,
WILLIAM C. MATTISON,
MARIO MATTHEW CUOMO,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. 881

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Town of Hempstead, appellee, pursuant to Rule 16 1(b) of the Revised Rules of the Supreme Court of the United States, moves that the appeal to this Court from the order of the New York State Court of Appeals be dismissed.

Report of Opinion in the Trial Court

Although in their Jurisdictional Statement appellants have set forth the opinions of the Court of Appeals and an opinion by the Supreme Court of the State of New

York (Nassau County) in a case not now before the Court, they did not include the opinion of the Trial Court, the Supreme Court of New York (Nassau County), in the case at bar. That opinion, a comprehensive one which considered separately each of the arguments made by appellants at the trial level in the full context of the evidence adduced at the trial, is set out in its entirety in the Appendix to this brief (Appellee's Appendix, Exhibit 1).

Statement

This case involves the Town of Hempstead's Ordinance No. 16 and its application to appellants' sand and gravel pit. That pit is a sprawling 20 acre crater containing a man-made lake and lying in a 38 acre tract devoted to sand and gravel mining.

Ordinance No. 16 was enacted in 1945 when all the Towns of Nassau County in New York enacted separate ordinances to curtail—in the language of Ordinance No. 16—"the danger to health and life caused by deep excavations remaining in the ground" (Pltf's. Ex. 1; R. 91; opp. p. 10 of R.). Before the enactment of the 1945 ordinances the courts in a number of reported cases had freely noted the peril that lurks in these pits and the lives that had been lost in them.[1] The danger continued to attract the attention of the courts even in more recent years.[2]

Ordinance No. 16 did not prohibit sand or gravel pits or their mining. It merely regulated the conduct of such op-

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[1] (See e.g. *Post Brick Co.* v. *Thompson*, 68 N.Y.S. 2d 159, 161 (Sup. Ct., Nassau County) (not officially reported); *People* v. *Gerus*, 69 N.Y.S. 2d 283, 291 (Co. Ct., Nassau Co.) (not officially reported)).

[2] (See e.g. *Town of Huntington* v. *Broad Hollow Estates, Inc.*, 138 N.Y.L.J. #55 Sept. 17, 1957, pp. 11-12 (Sup. Ct., Nassau Co.); aff'd without opinion 172 N.Y.S. 2d 543 (not otherwise reported)).

erations in order to minimize the dangers to life, health and property that had been caused by their unregulated use. Set back requirements, degree of bank slope, fence and retaining wall provisions were prescribed by its terms. These provisions operated to prevent cave-ins, falls and unsettling of properties neighboring on sandpits. In time, the ordinance was amended to provide that no pit excavation should penetrate the water table at the site; this provision was designed to eliminate the menace of children drowning in huge artificial lakes like the one here involved. The provision was inspired by the commonly known appalling statistics of children's drownings in such pits, of which both appellate courts below were asked to take notice.

Appellants' pit occupies slightly more than half the area of the 38 acre tract owned and operated by appellants in East Meadow, Town of Hempstead. Plaintiff's Exhibit 2 at the trial, a large aerial photograph, is a picture of the pit and the surrounding residential area. For the Court's convenience it has been reduced in size and is annexed to this brief (Appellee's Appendix, Exhibit 2). The pit itself is filled with water to an average depth of about 25 feet. In some places the water is as deep as 48 feet (Appellee's Appendix, p. 3a; Pltf's. Ex. 3, R. 139). The formation of this lake has resulted from excavation by appellants beyond the maximum level now permitted by Ordinance No. 16 (152-157). Although a body of water of undetermined size was first formed by appellant's excavations some 30 years ago, this water-filled crater became progressively larger and deeper with the continuance of the operation until finally it formed the present 20 acre lake.

The pit lies in the midst of a densely populated area where children and schools abound. There are approximately 2,200 homes within a 3,000 feet radius of the center of the sandpit with an estimated population of 8,800 people (Appellee's Appendix, p. 3a, R. 165). Four public schools are located within a radius of 3,500 feet; their en-

rollment is about 4,500 children. Within 1,500 feet there is situate a church where each day about 700 students (or each week about 3,500 students) receive religious instruction (R. 100-102; 110-115; 130).

There is no dispute over the fact that the pit flagrantly violates a number of the ordinance's more substantial proscriptions (see Appellee's Appendix, p. 3a): (a) in many places the excavation commences within 20 feet of the adjoining property line; (b) in certain places the pit excavation is more than 10 feet below the established grade of the nearest public street and the incline of the sidewalls is more than 2 horizontal feet to 1 vertical foot without the support of retaining walls; (c) there is no concrete curb beneath the fence which encloses the premises and (d) appellants' excavation goes far beyond the maximum depths allowed by the ordinance, thus penetrating the water table creating the described huge, artificial lake (R. 136-159; Pltf's. Ex. 3, R. 139; Pltf's. Ex. 4; R. 141; R. 160-169).

On the trial, appellants did not challenge the existence of the violations. They made two principal arguments by way of affirmative defenses: first, that the ordinance was unconstitutional and void because it was unjustly discriminatory, and second, that an earlier judgment of the Supreme Court, Nassau County in an action brought under an entirely different ordinance, was *res judicata* of the matters here litigated. Appellants also argued that the ordinance was unconstitutional in that it deprived appellants of its only possible profitable use of the premises and was thereby confiscatory. *Ex post facto*, and a number of other arguments since abandoned, were also urged (R. 650-680).

In its lengthy opinion (Appellee's Appendix, Exhibit 1) the Trial Court considered these defenses and rejected each of them. Appellants' argument with regard

to confiscation, which in the metamorphosis that has ensued since the trial of this case is now the appellants' principal contention, was specifically rejected by the Trial Court because of a total failure of proof (Appellee's Appendix, p. 9a). This factual disposition was unanimously affirmed by the Appellate Division of the Supreme Court (R. 757-762), and affirmed again by the Court of Appeals in the order from which this appeal is taken (Appellant's Appendix, pp. 17a-19a).

The Court of Appeals, in the opinion written for the majority by Judge Burke (Appellants' Appendix, pp. 1a-3a) noted the unanimous factual finding of the courts below with respect to appellants' failure of proof. In that context, Judge Burke adverted to the nature of the pit, its location in a densely populated area where many children reside, the hazards to both life and property, which as a matter of common knowledge accompany the uncontrolled operation of these pits, and found that the ordinance, as applied to the subject pit, could not be deemed arbitrary. He also pointed out that neither the ordinance nor the injunction proscribes sand and gravel excavations but that they merely condition the legitimate conduct of such operations upon compliance with the terms of the ordinance which are, as the Trial Court noted, "clearly suited for the curtailment of the obvious dangers" (Appellee's Appendix, p. 8a).

A dissenting opinion was written by Judge Van Voorhis. Appellants' argument here is an elaboration of that opinion. But the opinion by Judge Van Voorhis, and concomitantly appellants' argument here, are postulated on an assumed and erroneous statement of facts that is no part of the record to which the review in this Court would necessarily be confined. Moreover, even on the basis of the assumed facts on which appellants rely, their position is plainly at variance with the authorities and traditional principles of constitutional law.

The factual misconceptions are so numerous and so critical[8] that they will be separately but briefly noted here.

One of the principal props of appellants' contentions in this Court is the asserted fact that the judgment below, in effect, totally and absolutely prohibits appellants' operations and leaves their land valueless (Jurisdictional Statement, p. 10). The proposition is completely without factual support. Self-evidently neither the ordinance nor the judgment, as Judge Burke noted (Appellants' Appendix, p. 2a), proscribes all future excavations at the site. Indeed, some 18 acres of land remain which have not yet been excavated and are still available for whatever sand they might contain. Appellants' gratuitous suggestion that these 18 acres are needed for processing (Jurisdictional Statement, p. 18) and the dissenting opinion's observation that the photographs show this area "to be entirely occupied by the machinery used in the operation of the sand and gravel pit" (Appellants' Appendix, p. 9a) are simply inaccurate and have been rejected, as matters of fact, by all the courts below. The photographs speak for themselves and reference to the Topographical survey (Pltf's. Ex. 3, R. 139) and arithmetical computation from the figures supplied there would indicate that some 110,000 cubic yards of earth can still be mined in conformity with the ordinance in the unexcavated portion of the tract.

The flat statement in the dissenting opinion that the cost of refilling the existing excavation is in excess of $1,000,000 (Appellants' Appendix, p. 6a) is totally without foundation in this record. The Trial Court pointed this out (Appellee's Appendix, p. 9a). The figure was

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[8] Traditionally, this Court has treated the question as to whether a given governmental restriction is confiscatory as one which turns upon the record facts of each case. (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393.)

borrowed by the dissent, intact and without apparent challenge, from appellants' brief in the Court of Appeals.

Moreover, there is nothing in the record to show that this 38 acre tract—about one half of which is taken up with the pit—might not have some other and valuable use even if unavailable for sand or gravel mining. It is sufficient to note that appellants failed to eliminate any such possibility. That failure obliges the Court to the contrary assumption. (See *City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505; *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232).

The argument based upon the alleged total deprivation of a substantial and potentially profitable use has an additional critical debility. As a matter of fact it was nowhere established that there remained any sand or aggregate that could be profitably mined in the present water-filled excavation where further digging has been enjoined![4] Certainly this Court cannot interpolate such proof at this stage. Indeed, if inferences could now be drawn, they would militate against the possible existence of substantial deposits under the already excavated path of the 38 acre tract. Concededly, this excavation had been continuously mined for some thirty years prior to the subject ordinance (Jurisdictional Statement, pp. 4-5). Each year of excavation brought this depleting asset closer to the point of practical economic exhaustion. On this record that point might very well have been reached at or about the time the instant injunction became effective. At the very least, it is clear that appellants, upon whom the burden of proof lay, did not refute that possibility by proving that there was something of value yet to be mined in the subject excavation when the ordinance was enforced.

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[4] None of the exhibits indicates whether there is anything to be mined under the water-filled portion of the tract. The fact that varying depths are indicated in the topographical survey is inconclusive. Those maximum depths very likely were established as a result of exhaustion at given points in the pit.

There are other factually inaccurate premises in the substructure of appellants' argument. Thus it is not established that appellants complied with all of the regulations of the 1945 ordinance before its amendment, as is contended in the Jurisdictional Statement (at p. 5) and in the dissenting opinion (Appellants' Appendix, p. 8a). All of the folio references supplied by appellants pertain to the fence provision exclusively (235, 314-316, 319, 527, 528, 532). No attempt was made by appellants to show that its pits complied with all the other provisions of the ordinance before its amendment.

One additional misconception should be noted. In his opinion, Judge Van Voorhis stated that upon the oral argument the attorney for the Town said that the Town does not contend that the pit in question amounts to a nuisance (Appellants' Appendix, p. 8a). This single factor may very well have been a decisive consideration in Judge Van Voorhis' deliberations. Certain it is that the assumption is important to appellants' position (Jurisdictional Statement, p. 17). But as a matter of fact the statement in the dissent is not accurately descriptive of appellee's contention on oral argument. Whatever the cause of the misunderstanding, it should have been clear to the entire court, that appellee did not concede that the pit was not a nuisance. Indeed, at every stage of the litigation, throughout a total of six written briefs or memoranda and argument in four different courts, appellee argued quite the contrary. It has been appellee's consistent position that the appellants have not proved Ordinance No. 16 to be arbitrary or unreasonable irrespective of whether the pit could be said to constitute a technical "nuisance". Equally consistent has been appellee's position that the pit with its numerous violations of the ordinance *does* in fact constitute such a nuisance. The trial Court so held, in effect (Appellee's Appendix, p. 8a) and was affirmed by both State appellate courts. The argument was thus spelled out with simple

clarity in appellee's brief in the Court of Appeals: "Pits like the subject one constitute such a public nuisance." (See appellee's "Respondent's Brief in the Court of Appeals", p. 33.)[5] This argument was acknowledged by appellants. (See appellants' "Reply Brief in the Court of Appeals", p. 19.) That contention was repeated by appellee's counsel throughout his oral argument in the Court of Appeals (as it was urged in the Appellate Division), and although appellants now eagerly subscribe to the "concession" described by Judge Van Voorhis, no mention of it was made by their counsel in his reply argument before the Court of Appeals.

Thus, it seems evident that the position of the dissenters in the Court of Appeals, the position now taken by appellants in this court, is bottomed upon a series of factual hypotheses that have no place in the case at bar. When the case is limited to the facts in the record, the facts found and affirmed by all the courts below, the order appealed from is so clearly supported by the cumulative impact of compelling appropriate and well established decisional principles that no substantial Federal question exists. Those principles are briefly set out in the following pages.

ARGUMENT

The questions raised by appellants do not constitute substantial Federal questions.

Ordinance No. 16 comes before this Court attended by the familiar, weighty presumption of reasonableness and constitutionality which presumes the existence of necessary factual support for the enactment's provisions (*Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 210; *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154)

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[5] See also appellee's "Respondent's Brief in the Court of Appeals", pp. 16-17, 38.

if only the ordinance is related to some evil or threat to the community that is "reasonably apprehended" (*Matter of Stubbe* v. *Adamson*, 220 N. Y. 459). The heavy burden of rebutting this presumption rests, of course, with the assailant who must prove unconstitutionality beyond a reasonable doubt (*Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79).

Certainly the evil here is, at the very least, "reasonably apprehended" (*Matter of Stubbe* v. *Adamson, supra*). Both the Trial Court and the Court of Appeals adverted to the dangers to life and property as common ones. The statistics of fatalities by drownings in sandpits in Nassau County including, as Judge Van Voorhis noted (Appellants' Appendix, p. 10a), a death in the very pit in question, speak eloquently in justification of the provisions of Ordinance No. 16.* Other considerations, like the threat to property and property values inherent in unregulated pits, also militate in support of the ordinance (See *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 296).

As a simple matter of fact, appellants failed to bear the burden of proving the provisions of the ordinance unreasonable. They produced "little, if any, evidence" (Appellee's Appendix, p. 8a), and to their contention that there are more appropriate ways of dealing with the problems created by the subject pits, Mr. Justice Douglas' observations in *Queenside Hills Realty Co.* v. *Saxl* (328 U. S. 80; 82-83) are the short and conclusive answer.

Of course, ordinances like the one at hand many times result in hardship to individuals, but unless the law is patently arbitrary the individual interest must bow to the general welfare (*Hadachek* v. *Sebastian*, 239 U. S. 394, 410). In a case like this one, where the legislative body

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* The appellate courts below were asked to take judicial notice of these statistics as is this Court. See *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500; *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154.

has decreed that the object of the ordinance poses a serious threat to the health and safety of the community as well as to property and property values, an exercise of the police power in an ordinance like Ordinance No. 16 is not invalidated though its effect is to deprive the individual's property of its only profitable use (*Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Commonwealth of Pennsylvania*, 127 U. S. 678; *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadachek* v. *Sebastian, supra; Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498; *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155). Here, therefore, even had appellants been deprived of the only profitable use of their property it would not have constituted a defense to enforcement of the ordinance against them.

It has been pointed out earlier that the case at bar is not nearly as extreme as those just noted. Appellants have not proven that the premises in question (whether the 20 acre pit is considered by itself or as part of the larger 38 acre tract) have no possible profitable use as a result of the ordinance's operation (*City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505; *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232).

Indisputably, appellants' position is no stronger simply because their use began at a time before the ordinance was adopted. No permanent right to imperil the health or impair the safety and welfare of the community ever vests (*Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 84; *Hadachek* v. *Sebastian*, 239 U. S. 394, 410; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, 375, *cert.* denied 360 U. S. 902). Thus no reference to pure zoning ordinance cases like those relied upon by appellants (See Jurisdictional Statement, pp. 6, 12, 19-20; citing in reliance *People* v. *Miller; Town of Somers* v. *Camarco* and *Harbison* v. *City of Buffalo*) is helpful here. The traditional immunity of non-conforming uses from the application of zoning ordinances is altogether inappropriate to a consideration of regulatory ordinances designed to regulate certain uses

so as to avoid or minimize serious peril to the public health, safety and welfare. From time immemorial the inherent power of a community to protect itself against uses which threaten the public safety has been recognized. Thus, a nuisance can, in fact, be totally prohibited by a municipality (See *Reinman* v. *Little Rock; Hadachek* v. *Sebastian; Pierce Oil Corp.* v. *City of Hope*, all *supra*, and also 41 Col. Law Review 457, 459-467). The very cases relied upon by appellants (*Town of Somers* v. *Camarco*, 308 N. Y. 537, 541; *Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553, 561) and the law review authorities relied upon by them in the Court of Appeals (e.g., 102 U. Pa. Law Review 93; 93, 94, 102; 44 Corn. Law Quart. 450, 452; 1951 Wis. Law Review 685, 692-695) note these traditional principles and the distinction between zoning ordinances and ordinances like the one at bar.

This distinction serves also to illustrate the complete lack of merit in appellants' contention that the ordinance is a legislative act which takes away rights once vested by a judgment. In the pleadings, upon the trial and in the Appellate Division, this argument was not made in its present form. In substance, however, it is identical with the argument made by appellants in the pleadings and at the trial that the judgment in the 1956 action was *res judicata* of the issues raised here. Whether stated as it was below or cast in constitutional terms as it is in this Court, the argument is equally vulnerable. The thrust of this contention is that once rights have been established by a judgment those rights are deemed vested and cannot be impaired either by subsequent legislation or a second judgment. But the precise rights declared by the earlier judgment referred to by appellants were entirely different from those here affected. The prior action involved an entirely different ordinance, the zoning ordinance of the Town of Hempstead and established that appellants had the right to operate in a "B" residence zone despite the zoning ordinance. Since it was not an action to enforce

Ordinance No. 16 it obviously could not pass upon any alleged rights of the appellants with reference to that separate regulatory ordinance of the Town (See Appellee's Appendix, pp. 4a-5a).

Appellants' contention that the ordinance violates the constitutional prohibition of *ex post facto* laws on the assumption that they are liable to criminal penalties provided in the ordinance, is plainly beside the mark. This action involves no attempt to enforce penalties and the ordinance itself contains a "Separability" section which provides that if any part of the ordinance is declared invalid that declaration of invalidity shall not affect the remainder of the ordinance (Section 11, opp. p. 12 of R.). The penalty clauses therefore, even if themselves unconstitutional, are severable and consequently there is no present occasion to pass upon their validity (*Ohio Tax Cases*, 232 U. S. 576, 594; *Phoenix Ry.* v. *Geary*, 239 U. S. 277, 283; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma, et al.*, 286 U. S. 210; *Sonzinsky* v. *United States*, 300 U. S. 506, 512; *People* v. *Lathrop*, 3 N. Y. 2d 551; *Bankers Trust Co.* v. *Blodgett*, 260 U. S. 647).

Finally, it might be noted that the prevailing theme of appellants' argument (and of the dissenting opinion in the Court of Appeals) is the suggestion that Ordinance No. 16 was manufactured by the Town of Hempstead with the exclusive purpose of in some manner acquiring appellants' land. The suggestion is on its face a specious one. Ordinance No. 16, far from being directed exclusively at appellants' pit, was adopted in 1945 at a time when *all* the towns of Nassau County adopted similar regulations. These ordinances are commonplace. Some of the cases already cited show their application to a number of excavations in various parts of New York's Long Island region.[7] More-

[7] See also *Town of North Hempstead* v. *Colonial Sand and Gravel Co., Inc.*, 14 Misc. 2d 727; 178 N.Y.S. 2d 579 (Sup. Ct., Nassau Co.).

over, and this should be self-evident, the Ordinance does not result in a "taking". Eighteen acres of land as yet unexcavated remain available. More significantly, even if the mineral content of these eighteen acres has been exhausted and mining is no longer practicable, it has by no means been established that this 38 acre tract of land in a prosperous, burgeoning residential area is now valueless in the hands of the appellants.

On this factual issue of confiscation, as on virtually every factual issue in the case, the appellants adduced, as the Trial Court wrote, "little, if any evidence". In this Court, as in the Courts below, the appellants have devised an attack on Ordinance No. 16 relying on general principles that find no sustenance in the record.

CONCLUSION

The alleged Federal questions presented by appellants are predicated upon an assumed and inaccurate statement of facts, and, in any event, are not substantial. Accordingly, the appeal should be dismissed.

Respectfully submitted,

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Exhibit 1 of Appellee's Appendix

OPINION OF THE TRIAL COURT IN THE CASE AT BAR

TOWN OF HEMPSTEAD, Plaintiff, *v.* HERBERT W. GOLDBLATT et al., Defendants.

Supreme Court, Special Term, Nassau County,
July 13, 1959.

MARIO PITTONI, J. The town sues to enjoin the defendants from mining and dredging a certain sand pit located on the east side of Newbridge Avenue in the East Meadow section of the town until the defendants obtain a permit required by Town Ordinance No. 16, and until violations of section 4 of that ordinance are cured.

The defendants in their answer claim *res judicata*, protection of the *ex post facto*, of the due process, and of the equal protection clauses of the Constitutions, and the motives of the town officials as defenses.

It appears that the subject property, hereinafter sometimes called the sand pit, is 38 acres in size and has been used for the commercial mining of sand and gravel since 1927.

On December 18, 1945 the town adopted Ordinance No. 16 entitled, "Bank and Pit, Topsoil Removal and Other Excavations". Its declaration of policy (§ 1) states among others that the ordinance was "to prevent all manner of excavations which create pits, holes, or hollows in the earth, leaving it in a hazardous or dangerous state, or cause soil erosion • • • to remove the danger to health and life caused by deep excavations remaining in the ground • • • which ordinance will promote the safety, health and general welfare of the people of the Town".

The ordinance then goes on to say:

> Section 4 (as amended Nov. 25, 1958) (a) No Pit Excavation shall be made within twenty (20) feet of any property line.

Exhibit 1 of Appellee's Appendix

(b). No pit or bank excavation shall be made greater than ten (10) feet below the established grade of the nearest public street or highway unless the side walls remain at an incline of at least two horizontal feet to one vertical foot or are supported by retaining walls * * *.

(c). All pit and bank excavations shall be completely surrounded by wire fencing of the type known as chain link or cyclone fence, or its equivalent, of the height of six (6) feet set on a concrete curb not less than 18 inches in depth, with no opening except necessary gates for ingress and egress, to prevent public access to the top of any pits or deeply graded slopes.

(e). No removal of earth from the ground shall be so made as to undermine, weaken or deprive of support other lands in the vicinity * * *

(g). No removal of earth from the ground shall be so made as to prevent or interfere with the orderly development, for residential, business, manufacturing or public purposes, of other lands in the vicinity, * * * or as to substantially depreciate the value of real property in the vicinity.

(h). No excavation shall be made below two feet above the maximum ground water level at the site.

(i). The Town Board may deny any application for a permit hereunder if it shall find that the proposed excavation will violate any of the provisions of this section, * * *.

(j). When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance, * * * such pit or part thereof shall be immediately refilled with clean, non-

> burnable fill * * * and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

In the meantime, and since the subject property was first used as a commercial sand mining and dredging operation, the surrounding area of East Meadow has changed from a sparsely to a densely populated region, and the subject property has become a huge crater, or sand pit, in which there is an artificial lake that extends over 20 acres of the pit. The average depth of the water in this lake is approximately 25 feet, but in some areas the water is as deep as 48 feet. There is a link fence around the sand pit, but there is no concrete curb beneath it; and there are several holes under this fence, evidently dug by children, and large enough for human beings to crawl through. In numerous areas the pit commences at a distance less than 20 feet from the nearest property line, and in at least one instance the excavation commences at a distance less than 10 feet. The slopes of the sides of the pit in many places exceed two horizontal feet to one vertical foot. Also, the pit is more than 10 feet below the grade of the nearest public street.

Within a radius of 3,000 feet of the center of the sand pit are 2,200 homes with an estimated population of 8,800 persons; within a radius of 3,500 feet are 4 public schools with an enrollment of 4,532 pupils; and within a radius of 1,500 feet of this pit is a church where each week 3,600 pupils receive religious instruction.

Evidence on behalf of the defendants establishes that there are certain excavations, some dry and some water filled, and bodies of water such as lakes, brooks, streams, creeks, etc., within the town which are not in conformance with the standards of the ordinance. However, there was no evidence as to whether these excavations and bodies

were private, governmental, in use, or abandoned. A New York City-owned reservoir with no fence and a sharp slope was also shown.

A county official called by the defendants testified that there are approximately 400 water drain basins or sumps in Nassau County. Of these 300 are owned and supervised by the County and have fences around them; but approximately 100 of these still have no concrete curbs under the fences although the county has since 1952 been installing these curbs. The berm width specifications for these county sumps vary with the nature of the sand and the topographical conditions encountered. It was pointed out too that sumps by and of their very nature must be constructed so that the bottom is above maximum level, and that the standard regulation for the construction of sumps calls for a minimum of two feet above maximum ground water.

The first defense raised by the defendants is *res judicata*. This is based upon a judgment entered April 9, 1956 in an action by the town against the same defendants to enjoin them from operating the sand pit in violation of a zoning ordinance. Mr. Justice HILL, citing *People* v. *Miller* (304 N. Y. 105) and *Town of Somers* v. *Camarco* (308 N. Y. 537), denied the injunction on the ground that the defendants' substantial operation of the sand pit prior to the enactment of the zoning ordinance entitled the defendants to a nonconforming use. The issue in that case was one of vested property rights in the face of subsequently enacted zoning restrictions. The present action by the town is pursuant to an ordinance which regulates uses regardless of locations or zones under its governmental police powers for "the safety, health and general welfare of the people of the Town" (Ordinance No. 16, § 1). In the very *Town of Somers* v. *Camarco* (308 N. Y. 537, 541, *supra*) case cited by Mr. Justice HILL, the court said: "We do not

pass upon the question of what may be a proper exercise of the town's police powers so as to prevent the creation or maintenance of a nuisance on the premises of the defendants, or to otherwise lawfully regulate the defendants' business."

A judgment in one action is not conclusive when the two causes of action are different in the rights and interests affected, and the estoppel of *res judicata* is limited in such circumstances to the point actually determined. It is clear, therefore, that the causes of action and the issues of these two cases are not the same, and that the substance of the rights or interests established in the first action will not be destroyed or impaired by the prosecution of the second (*Schuykill Fuel Corp.* v. *Nieberg Realty Corp.*, 250 N. Y. 304, 307, 308).

It should be added that a motion by the defendants to dismiss a similar complaint against them by the town on the grounds of *res judicata* was denied by Mr. Justice CHRIST on September 13, 1956 (No. 6447—1956, Cal. No. 209) when he said: "it is plain that the issues indicated by the present complaint were not adjudicated in the prior action."

Another defense is that the sand pit was operated prior to the enactment of the ordinance and for that reason is immune against the exercise of this regulatory police ordinance. However, it is firmly established that a prior nonconforming use, whether judicially declared or not, does not make it immune against laws, ordinances and regulations of a police nature such as the one now in issue (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, 84; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. denied 360 U. S. 902; *Health Dept.* v. *Rector of Trinity Church*, 145 N. Y. 32, 43, 44; *Town of North Hempstead* v. *Colonial Sand & Stone Co.*, 14 Misc. 2d 727, 731 [HOGAN, J.]; *People* v. *Gerus*, 19 Misc. 2d 389, 393-395 [Nassau County, JOHNSON, J.]).

Exhibit 1 of Appellee's Appendix

The defendants also argue that the ordinance applies only to sand pits which are to be started in the future and that it does not apply to sand pits in being at the time of its enactment. A reading of the ordinance shows no provision exempting sand pits in operation at the time of its enactment, and it is obvious that the ordinance was intended to apply also to pits already in being and in operation. Whereas the opening of future sand pit excavations could be controlled by zoning regulations, the only protection against the abuse of existing uses has to come from these regulatory ordinances. This is particularly true when it has already been held that the defendants have the right to a nonconforming use under the authority of *People* v. *Miller* (304 N. Y. 105, 107), and *Town of Somers* v. *Camarco* (308 N. Y. 537, *supra*). Under the circumstances, it would be unreasonable to hold that the town, which was aware of the dangers posed by unregulated excavations (see Declaration of Policy of Ordinance No. 16, § 1), could have intended to exempt the sand pits in operation at the time of the adoption of the ordinance. Ordinances similar to this one have been interpreted as applying to sand pit uses in being at the time of the enactment of the ordinance (*Town of North Hempstead* v. *Colonial Sand & Stone Co.*, 14 Misc. 2d 727, 731, *supra* [HOGAN, J.]; *People* v. *Gerus*, 19 Misc. 2d 389 [JOHNSON, J.]). In the *Town of North Hempstead* v. *Colonial Sand & Stone Co. case*, Mr. Justice HOGAN said (p. 731): "Nor is there merit in their contention that the ordinance, by its express language, is intended to apply only to operations commenced after its adoption. It is a well-settled rule of statutory construction that an act shall be interpreted in the light of the mischief felt and the objects and the remedy in view (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 95 and cases cited therein). The Town Board cannot have intended in 1946, that an established opera-

tion should be permitted to continue untrammeled while a new one of precisely the same nature required drastic controls. It is equally well settled that 'A construction of a statute is favored which makes it operate equally on all classes of persons and avoids unjust discrimination' (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 147). Accordingly, the court holds that the ordinance is intended to operate equally upon all operations of a similar nature, regardless of the date upon which each was commenced. This interpretation needs no reconciliation with the Declaration of Policy, the preamble of the ordinance (*supra*)."

Still another defense raised by the defendant is *ex post facto*. Obviously, such a defense has no place in this civil trial; that doctrine applies only to criminal cases (*Calder* v. *Bull*, 3 Dall. [3 U. S.] 386, 390; *Kentucky Union Co.* v. *Kentucky*, 219 U. S. 140, 152, 153; *Bankers Trust* v. *Blodgett*, 260 U. S. 647, 652; *Matter of L'Hommedieu* v. *Board of Regents*, 276 App. Div. 494, affd. 301 N. Y. 476; 16 C. J. S., Constitutional Law, § 99, pp. 435, 437).

The defendants also contend that the ordinance is unconstitutional in that it is confiscatory and unreasonable as applied to them. In this respect they contend that the plaintiff has failed to establish the reasonableness of the ordinance itself. But it is fundamental that an ordinance such as this is presumed constitutional (*Borden's Co.* v. *Baldwin*, 293 U. S. 194, 209, 210); that the burden of showing the ordinance to be unreasonable rests upon the assailant (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219; *Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, 118; *New York Trap Rock Corp.* v. *Town of Clarkstown*, 1 App. Div. 2d 890 [2d Dept.], affd. 3 N. Y. 2d 844) and that this unconstitutionality must be established beyond a reasonable doubt (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219, *supra*; *Defiance Milk Prods. Co.* v. *Du Mond*, 309 N. Y. 537, 540, 541). Only as a last resort may courts strike

down legislative enactments on the ground of unconstitutionality (*Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219, *supra*; *Matter of Ahern* v. *South Buffalo Ry. Co.*, 303 N. Y. 545, 555, affd. 344 U. S. 367).

Under the tests as above stated the defendants have failed to sustain their burden of proof; in fact, little, if any, evidence was adduced to show the unreasonableness of the provisions concerning the width of the berms, fences, depth requirements and the like. They did give testimony that no cave-ins had occurred at the sand pit within the past 30 years. However, even if that be true, the town is not precluded from anticipating a danger and providing for a protection against it before it materializes. This is proper within its police power (*City of Rochester* v. *West*, 164 N. Y. 510, 514; *Town of Southport* v. *Ross*, 284 App. Div. 598 [3d Dept.]). Against this danger clearly recognized by the town (Ordinance No. 16, § 1), the defendants produced nothing to show that the ordinance had no reasonable relation to the dangers and undesirable features inherent in their sand pit.

Even without the benefit of the presumption of validity the provisions of the ordinance are clearly suited for the curtailment of the obvious dangers. Thus, the requirements concerning setbacks, slope requirements, fences, retaining walls, maximum ground levels and other such requirements, all provide protection against the danger of cave-ins, falls and drownings. These requirements are particularly pertinent here where the sand pit is a huge sprawling crater filled with water to an average depth of some 25 feet and forming a permanent, artificial lake of stagnant water in a densely populated community with thousands of children.

Then too, the right to use one's property may run in conflict with the interests of adjoining land owners. It is one thing to use your property—it is another to empty, to exhaust or to deplete your property so as to cause cave-ins or otherwise undermine the properties of adjoining land

owners. It is obvious without further belaboring the point that the deeper the digging and the closer to the adjoining land, the greater the danger to the latter and the homes thereon caving in.

Other considerations, such as the detrimental effect of this sand pit on the property values in the neighborhood, although not by themselves persuasive, add support to the reasonableness of this ordinance (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298; *Post Brick Co.* v. *Thompson*, 68 N.Y.S. 2d 159 [HALLINAN, J.]; *People* v. *Gerus*, 19 Misc. 2d 389, 397 [JOHNSON, J.] *supra*).

It may be that the enforcement of this ordinance will result in some economic hardship to the defendants; however, the exercise of police power in the interests of the public at large is generally in conflict with individual interests; and if the end sought is legitimate and the law is not arbitrary the individual interest must bow to the interest of the general welfare. This is particularly true when the object of the law poses a serious threat to public safety (*Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 302, *supra; Hadacheck* v. *Los Angeles*, 239 U. S. 394).

In support of the defendants' contention that their property is being confiscated, there is nothing in the evidence to sustain it. There is no evidence to show that the defendants cannot conform to the ordinance or what the cost to the defendants would be if they attempted to conform. Under the circumstances the court cannot guess or read into the record proof which is not there (*City of Yonkers* v. *Rentways*, 304 N. Y. 499, 505). In the *Rentways* case, Judge FULD said: "defendants, though they have attacked the ordinance as confiscatory, have completely failed to establish or present proof that there has been confiscation in fact. * * * Completely absent is any showing that * * * if such construction were impossible, that such could not be converted to some other profitable use."

Exhibit 1 of Appellee's Appendix

Even if the defendants had established that the enforcement of the ordinance were a practical prohibition, it would not be of assistance to them in this case where the danger to the public safety and welfare is a real and serious one. (*Hadacheck* v. *Los Angeles*, 239 U. S. 394, *supra*; *People* v. *Gerus*, 19 Misc. 2d 389, 393-395, *supra* [JOHNSON, J.]; *Lizza & Sons, Inc.* v. *Town of Hempstead*, 19 Misc. 2d 403 [JOHNSON, J.], affd. 272 App. Div. 921.)

Although the defendants did not allege the protection of the equal protection clauses of the Constitutions in their answer, they did take the position at the trial that the prosecution of his action against them constitutes discriminatory enforcement; that is, a failure to enforce the ordinance as against "other areas which violate the same ordinance". If we assume, for the sake of argument, laxity on the part of the public officials in the enforcement of the ordinance so as to result in unequal application of the law, that would not by itself constitute this present action a violation of the equal protection clauses. It is only where the party affected can show a palpable and deliberate scheme to oppress him while excluding all others who come within the terms of the ordinance that such an objection can be sustained (*Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Snowden* v. *Hughes*, 321 U. S. 1, 8, 15; *People* v. *Friedman*, 302 N. Y. 75, 80, 81).

In the *Friedman* case the court said that it is not required under the equal protection clauses that the ordinance "be perfectly symmetrical in its pattern of exclusions and inclusions". And again, quoting from the same case, the proof here does not show "a pattern of discrimination consciously practiced, as in *Yick Wo* v. *Hopkins* (118 U. S. 356); it merely indicated some nonenforcement as to certain other businesses many of which were allowed to remain open for the sale of permitted commodities".

An examination of the defendants' evidence fails to show that they have sustained their burden of proof in

this respect. Their evidence merely establishes that certain excavations, some dry and some water-filled, and certain bodies of water, such as lakes, brooks, streams, creeks, etc., within the town exist without conforming to the standards of the ordinance involved. The defendants have failed to show whether these excavations and bodies of water were private, governmental, abandoned or in use. Furthermore, none of these were shown to be presently operated or operating sand pits against which the ordinance is directed. Also, during the trial the defendants took the position that the ordinance should have been enforced against the Nassau County sumps; however, these county properties are dedicated to a vital public use and, therefore, do not come within the terms of the ordinance (§§ 2, 9). Then too, what authority would the town have to act against the county, another and superior governmental body?

If the defendants contend that the exemption of these county properties constitutes discrimination, not in the enforcement but on the face itself, then too that contention is not acceptable. The equal protection clauses do not deprive a municipality of the power to classify in the adoption of police power regulations; for it is well recognized that evils in the same area may be of different dimensions and proportions requiring, at least in the legislative body's opinion, different remedies (*Tigner* v. *Texas*, 310 U. S. 141); and the legislative body may confine its regulations and restrictions to those cases where the need is deemed to be clearer or more apt to exist (*Packer Collegiate Inst.* v. *University of State of N. Y.*, 273 App. Div. 203, 208, 209 [3d Dept.]; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379). "With the wisdom of such choice the courts have nothing to do; it is a matter solely for the Legislature to consider." (*Packer Collegiate Inst.* v. *University of the State of N. Y.*, 273 App. Div. 208, 209, *supra* [3d Dept.].)

Clearly, there is a sufficient basis for the classification in the present ordinance. These county sumps, or basins, differ from the permanently flooded sand pit involved herein. First, the existence of these basins or sumps is a necessity throughout Nassau County as a matter of survival. They must from time to time contain varying amounts of rain water; but this is not a permanent condition. It continues or lasts only so long as it is necessary for the trapped waters to run back into the ground. Furthermore, these basins or sumps all fall within the jurisdiction of the County of Nassau and are subject to the rules and regulations of that municipality. Thus, the county sumps or basins are sufficiently distinct from the sand pit or sand pits affected by the ordinance to take this case out of the equal protection clauses of the Constitutions.

The defendants' further contention that the town has failed to sustain the burden of proof on the inadequacy of a remedy at law is specious. The power to bring a criminal prosecution against the defendants for a violation of the ordinance herein is not such an adequate remedy at law which ordinarily bars injunctions. That is hornbook law for which no citation is needed. Furthermore, section 135 of the Town Law states: "The town board may * * * maintain an action or proceeding in the name of the town in a court of competent jurisdiction to compel compliance with or to restrain by injunction the violation of any * * * ordinance, rule or regulation, *notwithstanding that the ordinance, rule or regulation may provide a penalty or other punishment for such violation.*" (Town Law, § 135, as amd. by L. 1955, ch. 336, L. 1958, ch. 656; emphasis supplied.)

The last point raised by the defendants is the alleged motives of the town officials in bringing this injunction suit to court. It must be pointed out at the very outset

that on principle alone this contention is not acceptable. Any prior action or lack of action on the part of public officials may not be used as a bar to the bringing of an action when the action is in a representative capacity on behalf of the public. Public officials have no power and no right to waive their duties or obligations to enforce the law on behalf of the public for whom they are public servants. In other words, their individual actions are not binding upon the public whom they serve and on whose behalf actions such as this are and must be prosecuted. In short, the motives of the officials enforcing the ordinance are not relevant in this case (*Chase-Hibbard Milling Co.* v. *City of Elmira*, 207 N. Y. 460, 467; *Waterloo Woolen Mfg. Co.* v. *Shanahan*, 128 N. Y. 345, 362).

In the *Chase-Hibbard* case (*supra*, p. 467) the court said: "If the public authorities were authorized to do what they did do with the river channels, the reasons that moved them do not concern the plaintiff. * * * The assignment of an improper motive, or reason, for doing an act, which the municipality was authorized to perform could not make the act illegal."

In the *Waterloo* case (*supra*, p. 362) the court said: "If the state has the right * * * then the motives that underlie the act are not material. The reasons that move the public authorities do not concern the plaintiff."

It does not appear that the defendants have raised any other issues.

The court thus finds that Ordinance No. 16 and the enforcement thereof are valid exercises of the town's police power; the plaintiff is therefore entitled to the relief demanded in the complaint.

This is the decision of the court pursuant to section 440 of the Civil Practice Act.

Settle judgment on notice.

Exhibit 2 of Appellee's Appendix.

(See opposite ☞)

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Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~301~~ 78

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Supreme Court of the United States

OCTOBER TERM, 1960

No. 881

HERBERT W. GOLDBLATT and BUILDERS SAND AND GRAVEL CORP.,

Appellants,

—against—

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

This brief is submitted pursuant to Rule 16 (3) of the Revised Rules of the Supreme Court of the United States.

Appellee's motion to dismiss is based on its contention that no substantial federal question is raised by appellants in their Jurisdictional Statement. Appellee's contention, in turn, is premised on a main argument, *viz.*: that Ordinance No. 16 is only a *regulatory* ordinance governing the operation of sand pits and, therefore, under decisons of this Court—particularly and primarily *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80—there is no substantial federal question. The majority opinion of Judge Burke adopted appellee's major premise, the opinion stating (Jurisdictional Statement, p. 2a): "Neither the injunction granted

nor the ordinance proscribes any future excavation. The injunction *merely* conditions future operations upon the issuance of a permit from the Town of Hempstead and the correction of certain violations of the ordinance". The majority opinion continues: "It is not the function of the courts, but of legislators to determine 'the reasonableness, wisdom and propriety' of the *regulations* needed to protect the community (*South Carolina Highway Department* v. *Barnwell*, 303 U. S. 177, 191) and their *regulatory* power, as the United States Supreme Court has pointed out, governs pre-existing uses (*Queenside Hills Co.* v. *Saxl*, 328 U. S. 80; *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2nd 370, cert. denied, 360 U. S. 902)." (Emphasis added.)

We agree that if this were just another case of legislation regulating methods of operating sand pits, then the ordinance would be constitutional under the holding in the *Saxl* case. However, the 1958 Ordinance No. 16 (particularly Sections 4(h) and (j), as applied to the facts of this case, permits only one conclusion, *viz.*: *all* further excavation which for 30 years has been done underwater on appellants' property is prohibited. Thus this case comes within the holding of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, not the *Saxl* case which involved the installation of an automatic wet pipe sprinkler system in a lodging house on the Bowery in New York City. Appellee does not even mention the *Mahon* case. This is a case of confiscation, not regulation of property and business of appellants.

Further, Section 4(j), *by its very terms* (and also the Judgment appealed from), requires appellants to refill the excavation, extending over 20 acres, which was legally made over a period of 30 years.

Appellee's contention that the Ordinance is "merely" regulatory is summarized as follows (Appellee's brief, p. 6): "One of the principal props of appellants' contentions

in this court is the asserted fact that the judgment below, in effect, totally and absolutely prohibits appellants' operations and leaves their land alueless (Jurisdictional Statement, p. 10). The proposition is completely without factual support." Appellee continues (p. 6) "Self-evidently, neither the ordinance nor the judgment, as Judge Burke noted (Appellants' Appendix, p. 2a) proscribes all future excavation at the site. Indeed, some 18 acres of land remain which have not yet been excavated and are still available for whatever sand they might contain".

First, as to the contention that the Ordinance does not "proscribe" all future underwater excavation, we have only to consider the language itself of Section 4(h) and (j) of the Ordinance. Secondly, the fact that appellants own 18 additional acres of property not underwater cannot possibly make legal or constitutional the taking—without payment—of the 20 acres underwater.

In exactly 17 words constituting Section 4(h), all underwater dredging and excavating (which had been adjudicated a proper use of appellants' property in the 1956 judgment (pp. 11a-14a of the Jurisdictional Statement) is specifically, unequivocally and expressly proscribed. Section 4(h) provides: "No excavation shall be made below two feet above the maximum ground water level at the site." Admittedly, and as stated on page 3 of appellee's brief: the excavation extending over 20 acres of appellant's property "is filled with water to an average depth of about 25 feet." Since 4(h), *by its very terms*, prohibits any excavation "below two feet *above* the maximum ground water level at the site", the *only* possible conclusion is that any excavations on the 20 acres of its land now underwater (average depth of 25 feet) is proscribed by and violates Section 4(h) of the Ordinance. The judgment (folio 58 of Record on Appeal) correctly states: "The pit has been

excavated substantially beyond points two feet above the maximum ground water levels at the site" and this constitutes "a violation of the said Ordinance No. 16" (folio 57).

The dissenting opinion of Judge Van Voorhis correctly concludes, after analysis of the Ordinance and facts in this case, that "the theory of 'regulation' cannot reasonably be sustained". The distinction between the *Saxl* and *Engelsher* cases of regulation, on the one hand, and prohibitory and confiscatory regulation, *Pennsylvania Coal Co.* v. *Mahon*, on the other hand, is set forth in the dissenting opinion (pp. 6a, 7a of the Jurisdictional Statement). The majority opinion which concludes that the Ordinance is "merely" *regulatory* contains no analysis of the provisions of Sections 4(h) and (j)—does not even mention these sections—and does not consider, the *Pennsylvania Coal* v. *Mahon* case.

Not only does Section 4(h), by its terms, prohibit all future excavation underwater on 20 acres of appellants' property but Section 4(j) of the Ordinance (set forth at p. 15a of the Jurisdictional Statement) requires appellants to restore the premises to its condition of 30 years ago by filling in the excavation covering these 20 acres, from which 1,000,000 cubic yards of earth have been removed (Record on Appeal, folio 237). Our extensive research of applicable decisional law reveals no case where the kind of affirmative action required by Section 4(j) has been sustained as an exercise of police power. The fact is appellee itself does not even try to answer that part of the Jurisdictional Statement in which appellants considered the requirements of Section 4(j) of the Ordinance.

Pursuing its main point: that Ordinance No. 16 does not prohibit but "merely" regulates appellants' underwater dredging, appellee argues (p. 11) that there may be other profitable uses of appellants' property on which an arti-

ficial lake[1] exists. (Inherent in this argument is the assumption that other profitable uses of defendants' property underwater exist—although Section 4(j) requires that the lake be refilled.) Appellee cannot suggest a single profitable use, other than dredging,—for the simple reason: there is no other profitable use. The suggestion made in one of appellee's briefs (in the Appellate Division) that the lake could be used for boating or swimming, was discarded when appellants pointed out (1) that Section 4(j) requires the lake be filled in and (2) appellee's suggestion is contrary to the assumed (but false) major premise that the water on appellants' property is dangerous, *per se*.

Striving again to get away from the unambiguous provisions of Sections 4(h) and (j) which confiscate defendants' property rights by completely and forever eliminating underwater dredging, appellee argues (p. 7) that there is or may be no more sand and gravel to be excavated under appellants' 38 acre tract. This argument is contrary to the undisputed testimony (folios 327-329) that there are available deposits to be removed. Even appellee's own statement (p. 3) that the excavation underwater had a depth of 48 feet in various places, with an average of 25 feet, shows that there is at least 23 feet of earth to be removed over the 20 acres now under water (see appellee's exhibit 3). Appellants were excavating and selling sand and gravel right up until the entry of judgment in this case.

Although the basic premise of the majority opinion of the New York Court of Appeals is that Ordinance No. 16

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[1] Appellee's ominous description of the excavation as a "huge crater" and its statement (contrary to proof) that the water is "stagnant" were adopted as facts in the opinion written by the Trial Court. Actually the lake is fed by natural springs and the dredging operations themselves cause a continuous circulation of water.

is only a "regulatory" ordinance, nevertheless appellee argues that even if the ordinance is considered confiscatory and prohibitory and "though its effect is to deprive the individual's property of its only profitable use" (Appellee's brief, p. 11), the ordinance would still not be a taking of property without due process of law. In support of this argument, appellee cites (p. 11) *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadechek* v. *Sebastian*, 239 U. S. 394, and *Pierce Oil* v. *City of Hope*, 248 U. S. 498. These cases (described as "extreme cases" by Mr. Justice Douglas in the *Saxl* case, 328 U. S. 80, 83) involved activities which were found to be, on demurrer, noxious, offensive and "productive of disease" (Mr. Justice Pitney in *Reinman* v. *Little Rock*, 237 U. S. at p. 178).

In the instant case, there is absolutely no proof whatsoever that the appellants' operations were noxious, offensive, dangerous, a nuisance, or productive of disease. In place of such evidence, the Trial Court and the majority opinion in the Court of Appeals substituted "common knowledge". In place of proof—and contrary to the proof and contrary to the concession of "no nuisance" which appellees' counsel made on the oral argument in the Court of Appeals—the Trial Court adopted the recital of Ordinance No. 16 as its sole basis for its holding. Having overcome the presumption of constitutionality involved in these recitals (see p. 8, *infra*) the case at bar stands on all fours with the situation in the *Mahon* case where this Court reversed the decision of the high Court of Pennsylvania which had likewise sustained the constitutionality of the Statute prohibiting coal mining under houses, on the basis of the recitals of the Pennsylvania Statute and the presumption of constitutionality (*infra*, p. 12).

Furthermore, in the *Reinman*, *Hadechek* and *Pierce Oil* cases, this Court pointed out that the noxious business could move elsewhere; and in the *Hadechek* case it was

specifically pointed out that the Court was not prohibiting the taking of the clay out of the ground, but only the making of the brick from the clay (see Jurisdictional Statement, pp. 14, 15).

The *Reinman*, *Hadechek* and *Pierce Oil* cases were decided on motion or demurrer. In the *Reinman* case, the plaintiff demurred to the answer of the City of Little Rock which, in the words of Mr. Justice Pitney, had alleged that plaintiff's "stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease." Mr. Justice Pitney pointed out (p. 178):

> "Plaintiffs did not contradict this but demurred to the answer as insufficient in law and the case was heard in the trial court upon * * * the demurrer."

Likewise, the *Pierce Oil* case was decided on a demurrer and on the pleadings which alleged that the storage of gasoline 300 feet away from any dwelling was dangerous. Neither the *Reinman* nor the *Hadechek* nor the *Pierce Oil* cases are cited in Mr. Justice Holmes' opinion in *Pennsylvania Coal Co.* v. *Mahon*. The fact that Mr. Justice Holmes also wrote the opinion in the *Pierce Oil* case is significant.

Furthermore, in none of those cases was there any affirmative requirement that the owner of the business not only desist from carrying on the noxious business, but go further and make an expenditure of approximately $1,000,000 (required in our case) to restore the premises to their original condition. Moreover, in none of these "extreme cases" had there been a previous adjudication, such as we have here, that the business involved was a legitimate and proper business, nor was there a judicial finding such as was made in the 1956 litigation (Jurisdictional Statement, p. 11a) in our case that appellants were "entitled * * * to continue their operations, *in futuro*, as to the entire premises". (See Jurisdictional Statement, pp. 20, 21.)

The majority opinion of the New York Court of Appeals sustains the constitutionality of the Ordinance on the general principle of presumption of constitutionality involved in the mere passage of legislation. However, as we have shown in our Jurisdictional Statement (pp. 11-13) this presumption was overcome (1) by the undisputed fact and showing that appellants' vested rights of a prior nonconforming use of their property (constituting their excavating business, continually operated since 1927 and judicially declared valid), have been eliminated and confiscated; and (2) any presumption of constitutionality involved in the mere recital of the ordinance (viz.: "to remove the danger to health and life caused by deep excavations remaining in the ground") was overcome by the proof that there was not a single instance of danger or damage to surrounding property, there was not a single case of any injury to a single person—adult or child—caused by appellants' 30 years of operations, and that there was not even a single instance of trespassers on appellants' property, completely surrounded by 7,000 lineal feet of wire fence. Appellee appears aware of the fact that the presumption of constitutionality was overcome and therefore (1) appellee asks this Court to take judicial notice of a death which allegedly happened (no facts given) on appellants' premises in 1944, before any Town ordinance required fencing, and (2) appellee now challenges (brief, p. 18) its own concession made on the oral argument in the Court of Appeals, that appellants' operations did not constitute a nuisance. This concession was noted in the dissenting opinion (Jurisdictional Statement, p. 8a) in which three judges joined.

As to the alleged death (which Appellee raised for the first time in its brief in the Court of Appeals), Mr. Justice Van Voorhis (Appellants' Appendix, p. 10a) noted: this

alleged death "is not shown by the record". According to appellee's own version (in its brief in the Court of Appeals) there was a police report in 1944 of a death, which gave no factual basis and ascribed no fault to appellants. As also noted by Judge Van Voorhis, whatever the situation be with respect to this 1944 case, it happened prior to the enactment by the Town-appellee of any ordinance requiring a fence. It was not until 1945 that the Town ordinance required such fence, and admittedly appellants have built a wire fence in full compliance with that ordinance, surrounding the entire premises of appellants (7,000 lineal feet), 6 feet high, topped by three strands of barbed wire. Since that time appellee cannot show—even outside the record—a single instance of an accident or injury to person or property.

Furthermore, this one incident, *dehors* the record, would not prove danger or nuisance sufficient to sustain Ordinance 16 which eliminates appellants' non-conforming prior use of excavation without compensation. And it would be appellee's burden to prove such nuisance. Certainly appellants had no duty to prove their operations constituted a nuisance. See opinion of Conway, *C. J.* in *Town of Somers* v. *Carmarco*, 308 N. Y. 537, at p. 541 where it is stated that in order to sustain legislation confiscating vested rights of a non-conforming prior use under the "town's police powers" it is necessary for the town to prove that the ordinance is "to prevent the creation or maintenance of a nuisance on the premises of the defendants." In our case appellee made no attempt to prove such nuisance which, as we said, explains its current attempt to bring in a "reported", isolated 1944 happening *via* the doctrine of judicial notice.

The statement in appellee's brief (p. 10) which was adopted in the opinion written by the trial court, of

drownings in *other* sand pits is again matter *dehors* the record and is totally irrelevant and immaterial in our case since our case involves no proof of a single accident—let alone death—and ours is *not* an "unregulated" pit such as appellee discusses in its brief (p. 10). In any event these "other cases" do not supply or constitute proof of nuisance or danger in appellant's operations.

Throughout appellee's brief, as well as throughout the opinion of the Trial Court, there is the unfounded assumption that there is danger *per se* or nuisance *per se* in the existence of a body of water or in dredging operations under a body of water. The law is to the contrary. See *infra*, p. 11.

Likewise, in the opinion of the Trial Court, there is the unfounded assumption—contrary to the proof (Record on Appeal, folios 464, 469)—that appellants' operations are dangerous to neighboring land. Similarly, in the majority opinion of Judge Burke, reference is made to "common knowledge" that "the uncontrolled operation" of sand pits presents a hazard. Appellants' operations were *not* "an uncontrolled operation" and appellants do not claim that they are not subject to control or regulation. Until Ordinance No. 16 was amended in 1958 to include Sections 4(h) and 4(j), the Ordinance was regulatory and appellants complied with all regulations. Appellants cannot comply with Sections 4(h) and (j) of the 1958 ordinance which *prohibits* further excavation under water. The only way to *comply* is to desist—and fill the excavation, covering 20 acres.

As to appellee's denial that it made a concession that appellants' activities do not constitute a nuisance—since the concession is not part of the Record, but was noted by the three dissenting Judges (p. *8a* of Jurisdictional

Statement), we leave the conclusion about the making of that concession to this Court. Whether or not the concession was made, the fact remains there is *no proof* of any nuisance in appellants' excavating activities which the Ordinance now proscribes. The evidence is to the contrary. Therein does this case differ from the "extreme cases" noted *supra*, p. 6.

There is an essential fallacy in the underlying assumption that a body of water is inherently dangerous. The assumption pervades the majority opinion of the Court of Appeals, which recites the fact that appellants' sand pit exists in the midst of a residential area.[1] In numerous New York cases it has been held that a body of water is *not* "inherently dangerous" or a "nuisance". See *Pope* v. *State*, 198 Misc. 31, 36, aff'd 277 App. Div. 1157; and *Cunningham* v. *City of Niagara Falls*, 232 App. Div. 49, 42, aff'd 269 N. Y. 644. In both cases, an unfenced and unguarded body of water was held *not* to be "classified as inherently dangerous or a nuisance" (198 Misc. at p. 36).

In answer to the observation made in the majority opinion, that there are 2,200 homes and 4 schools in the neighborhood of appellants' premises (which are completely surrounded by a 7,000 lineal foot wire fence) we might note that there exists in Central Park in New York City a body of water, unfenced, and surrounded by thousands of homes, hundreds of schools and millions of children. Moreover, and again concerning appellee's reference to a death supposedly on appellants' premises (no facts given)—if that "fact" be subject to judicial notice, then judicial notice should be

[1] The objection to appellants' activities in this neighborhood was adjudicated against appellee in the 1956 litigation (Jurisdictional Statement, pp. 11a-14a). As noted by Judge Van Voorhis: "Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants' operations and the artificially created lake were evident and obvious."

taken of the fact that there were reportedly 3 drownings in Central Park in 1960. Judge Van Voorhis noted:

> "There are some hazards in the operation of any legitimate business. Automobiles are not kept off highways for the reason that children as well as adults are occasionally injured or killed by them."[3]

In *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, this Court reversed the Supreme Court of the State of Pennsylvania (274 Pa. 489, 497), where the constitutionality of the Kohler Act, prohibiting coal mining under dwellings and public places had been upheld as a valid exercise of the police power. The Pennsylvania Court had relied upon the finding of the Pennsylvania legislature and the Governor who signed the bill that the legislation was enacted because "lives have been lost, homes, churches and schools destroyed, and an ever present peril has threatened the morale of the entire community" (*Mahon* v. *Pennsylvania Coal Co.*, 274 Pa. 489, 497). The Pennsylvania Court went on further to say that the mining which was prohibited by the Kohler Act had been declared by the Legislature "to be a public nuisance". The opinion of Mr. Justice Holmes in the *Mahon* case (as well as the dissent of Mr. Justice Kephart in the Pennsylvania Court (274 Pa. at 512)) challenged the recital that the Act was passed to "prevent the terrible menace to human life, public safety and morals".

Likewise, in our case, the mere recital in the Town's ordinance of danger in pits generally was overcome by the proof in this case that there was no danger in fact (no injury to person or property, and no threat of such injury or danger); and there is no danger *per se* in appellants'

[3] We doubt that appellee would contend that legislation prohibiting automobiles would be constitutional, cf. *Trio Distr. Corp.* v. *City of Albany*, 2 N. Y. 2d 690, 696.

operations or in the existence of a body of water, completely surrounded by wire fence maintained in good condition.[4]

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393, was considered in both the majority and the minority opinions of this Court in *United States* v. *Central Eurica Mining Co.*, 357 U. S. 155, 168, where the majority held that a W. P. A. order closing gold mines during the war was only a temporary restriction on the operation of the gold mines and was, therefore, not a "taking of property". However, Mr. Justice Burton, after citing the *Mahon* case, said (p. 168):

> " • • • we have recognized that action in the form of a regulation can so diminish the value of property as to constitute a taking, e.g., United States v. Kansas City Ins., 339 U. S. 799; United States v. Cansby, 328 U. S. 256."

The majority opinion written by Mr. Justice Harlan, citing the *Mahon* case, would pay compensation (under the Fifth Amendment) for the taking by the United States of the gold mines, although only temporarily restricted. The dissenting opinion cites the statement of Mr. Justice Holmes in the *Mahon* case:

> " • • • if regulation goes too far, it will be recognized as a taking."

This Court has often stated that the taking of property by the United States government under the Fifth Amendment is governed by the same principles as a taking by State legislation under the Fourteenth Amendment.

---

[4] The observation by the Trial Court of holes "under the fence, evidently dug by children" finds absolutely no support in the Record on Appeal.

Concededly the appellee-town, in enacting the 1958 ordinance wanted to get rid of appellants' operations and particularly the body of water existing on 20 acres of appellants' land. The opinion written by the Trial Court evidences the same *desideratum*. However, as stated by Mr. Justice Holmes in the *Mahon* case (260 U. S. at p. 416): " * * * a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change". The "constitutional way" is, of course, by the "exercise of eminent domain and compensation to sustain the act" (260 U. S. at p. 413).

The appellee does not deny (1) the fact, as noted in our Jurisdictional Statement, that the appellee-town actually had prepared a drainage map (Exhibit C in evidence) which contemplated the use and taking of appellants' property in condemnation and (2) the fact that representatives of the appellee had talks with appellants concerning condemnation. Instead of carrying through with such constitutional method of taking appellants' property, appellee chose the enactment of Ordinance No. 16 which accomplishes the same purpose, *without* compensation to appellants. Ordinance No. 16 is in reality what this Court in *Loan Association* v. *Topeka*, 20 Wall. 655, 664 characterized as "not legislation" but "robbery * * * under the forms of law." Mr. Justice Holmes noted (260 U. S. at p. 415) the "natural tendency of human nature is to extend" the doctrine of "police power * * * more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States".

Finally, we come to appellee's argument, adopted in the majority opinion of Judge Burke, to wit: that the Ordi-

nance is not unconstitutional, even so far as it prohibits further operations on the 20 acres (where the water exists and requires a refilling of that entire acreage) because appellants own 38 acres and the 18 acres not under water are, in the words of Judge Burke, "available for excavation". We think the statement of the argument is sufficient refutation of the argument.

This is no ordinary case of zoning or a regulating a business or this business of appellants. In our Jurisdictional Statement and in this brief we have considered only Sections 4(h) and (j) of the 1958 Ordinance. Other requirements, such as the placing of a concrete curb beneath the 7,000 feet of fence which had been built according to the 1945 Ordinance go beyond reasonable regulation. "No object in the installation of this concrete curbing has been shown except that it would put [appellants] to the expense of removing the fence, laying the concrete and constructing a new fence. This along with [other provisions of the 1958 Ordinance] * * * shows that the purpose was expropriation rather than regulation" (Van Voorhis, *J.*, at p. 8a of Jurisdictional Statement). If we are permitted a plenary hearing in this Court, we would demonstrate at length how other provisions of the 1958 Ordinance e.g. degree or grade of slope, constitute unconstitutional requirements (see p. 8a of Jurisdictional Statement).

This is a case where there has been an "arbitrary and discriminatory exercise of the police power", *Dobbins* v. *Los Angeles,* 195 U. S. 223, 241.

On the issue of whether the penal provisions of Ordinance No. 16 violates the constitutional provision prohibiting *ex post facto* legislation, see, in addition to the cases cited in our Jurisdictional Statement, *Trop* v. *Dulles,* 356 U. S. 86.

On the issue of whether the 1958 enactment of Ordinance No. 16 violates the due process clause in overruling rights acquired by the 1956 judgment (see Jurisdictional Statement, pp. 20, 21), the appellee argues (p. 12) that the 1958 ordinance was not in existence when the 1956 case was tried and therefore the 1956 judgment is not *res judicata*. Of course, the 1958 ordinance was not adjudicated in the 1956 lawsuit. It was enacted to overcome and overrule—and it does overrule—the rights acquired by appellants under the 1956 judgment. That is precisely why the Ordinance is violative of the due process clause, taking away rights acquired in the 1956 judgment. Appellee fails to answer this point (see Jurisdictional Statement, pp. 20, 21).

In the *Saxl* case (328 U. S. at p. 82) Mr. Justice Douglas noted: "The case is here on appeal, the Court of Appeals [of New York] having certified * * * that questions involving the Fourteenth Amendment were presented and necessarily passed upon". Beyond any doubt our case presents only such constitutional questions. Both the majority and minority opinions of the New York Court of Appeals *expressly* so state.

CONCLUSION

The motion to dismiss should be denied. There are very substantial federal questions involved. The judgment below should be reversed; or in the alternative, a plenary hearing of the constitutional issues should be permitted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, ET AL., *Appellants*

v.

TOWN OF HEMPSTEAD

On Appeal from the Court of Appeals of the State of New York

MOTION OF NATIONAL CRUSHED STONE ASSOCIATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Crushed Stone Association respectfully moves, pursuant to Rule 42 of this Court, for leave to file the annexed Brief Amicus. Appellee has refused to consent to the filing of this brief. The interest and the reason for participation of the Association are as follows:

The National Crushed Stone Association is a trade association composed of commercial producers of

crushed stone throughout the United States and Canada. Zoning of quarries and related regulatory measures have been among the principal areas of interest of the Association in recent years. This is due to the fact that, across the nation, members of the Association have felt themselves oppressed by hostile zoning ordinances and regulations as urban areas extended into the formerly rural sections where quarry operations are typically located. The widespread existence of the problem is attributable to the economics of our industry.

Stone is a high-bulk, low-value commodity. In consequence, transportation charges tend to constitute a high percentage of the delivered price of crushed stone. This economic fact compels the operator to locate his quarry as close to market as possible. With the extraordinary increase in urban populations over the past 20 years, numerous quarry owners—such as Mr. Goldblatt—have found their operations engulfed by suburbia. Hard-pressed city planners, themselves overwhelmed by the twin tides of population shifts and increases, and often subject to strong local political pressures, have exhibited little sympathy for the stone producer. The present case is illustrative of the impact of these combined social, political and economic forces on the crushed stone industry.

The regulatory ordinance here in issue has the practical effect of terminating quarrying operations which long antedate the development of the community that now surrounds them. The ordinance does not rest upon a finding that the operation in question is dangerous to the health or welfare of that community or that it constitutes an abatable nuisance. On the contrary, the record is absolutely devoid of any evidence to support

such a finding and none was made. So far as appears from the record, the ordinance is based solely upon the antipathy of the community to an industrial operation in its midst. The New York Court of Appeals, however, took judicial notice of the "fact" that quarry operations are intrinsically dangerous and, on this basis alone, concluded that the ordinance was a reasonable exercise of the regulatory authority of the local community. The Court ignored the argument of appellants that the Ordinance, even if otherwise valid, was unconstitutional because it failed to provide for the payment of just compensation.

From the point of view of the members of the crushed stone industry, the gravity of such a holding cannot be overstated. If these principles should be approved by this Court, quarry operations would, henceforth, exist entirely at the whim of local regulatory authorities. As a matter of public policy this would be intolerable since it would condition economic survival on political favor. As a matter of constitutional law the effect would be to deprive the quarry owner of his property without procedural or substantive due process. If the right to a hearing is to mean anything, it must, at least, encompass an opportunity to persuade the hearer. This opportunity is denied if the hearer may notice as the determinative "fact" that which the litigant vigorously denies to be true. Similarly, the guarantee of just compensation imported into the Fourteenth Amendment by the due process clause is illusory if a municipality may avoid its requirements by the simple device of denominating a confiscatory ordinance a "regulation."

Moreover, it would appear that the state Courts attributed no significance to the fact that the Ordinance

would end the exploitation of a natural resource. In the Association's brief are discussed the several factors which warrant application of unique principles in cases where the ordinance in issue has such an effect.

CONCLUSION

Because of the importance to the crushed stone industry of the questions presented and because the points discussed therein should be considered by this Court, it is respectfully submitted that the Motion For Leave To File the Annexed Brief Amicus should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, ET AL., *Appellants*

v.

TOWN OF HEMPSTEAD

BRIEF OF THE NATIONAL CRUSHED STONE ASSOCIATION AS AMICUS CURIAE

STATEMENT

Appellants own 38 acres of land in the town of Hempstead, Long Island. The property has been used for commercial mining of sand and gravel since 1927 (R. 177). Within a year after operations began excavation had gone below water level and an artificial lake had been created (R. 18). By 1945 the area had changed from a "sparsely to a densely populated region" (R. 178). In that year Appellee enacted Ordinance No. 16 (R. 178). The Ordinance required, *inter alia*, that no pit excavation be made within ten feet of any property line; that all such pit excavations be sur-

rounded by a six-foot, chain-link fence; and that the declining angle of the slope of the pit not be steeper than 45 degrees (R. 205). To comply with the provisions of the Ordinance, Appellants totally enclosed their property with a six-foot, chain-link fence, topped by three strands of barbed wire. (R. 44, 82). The sides of the excavation were not within ten feet of any property line (R. 120), and the angle of the slope of the pit was not in excess of 45 degrees (R. 82). In short, Appellants achieved full compliance with Ordinance No. 16, as originally enacted (R. 201).

Sometime prior to 1956 Appellee Town adopted a zoning ordinance placing Appellants' property in a "Residence 'B' Zone" (R. 17), and in 1956 Appellee brought an action to restrain Appellants from operating their pit on the theory that the dredging operations constituted a violation of this ordinance.[1] The trial court in that case denied the injunction, finding Appellants' operation to be a prior nonconforming use of the property. No appeal appears to have been taken from the trial court's decree.

In 1958 Appellee amended Ordinance No. 16—the "regulatory" ordinance first enacted in 1945. Section 4 of the Ordinance was amended to provide that (1) no pit excavation shall be made within 20 feet of any property line (R. 7) (Before amendment the minimum distance had been 10 feet, R. 205); (2) the fence required by the original ordinance be set ". . . on a concrete curb not less than eighteen inches in depth" (R.

[1] The Town zoning ordinance is unrelated to Ordinance No. 16. That Appellee chose to bring its action under the zoning ordinance rather than under Ordinance No. 16 demonstrates Appellee's recognition of the fact that Appellants were in compliance with the terms of Ordinance No. 16.

7); and (3) the angle of the slope be not greater than 30 degrees (R. 7) (formerly 45 degrees, R. 205). In addition to these changes Section 4 of the amended Ordinance contained the following new requirements:

> "(h) No excavation shall be made below two feet above the maximum ground water level at the site.
>
> * * *
>
> "(j) When earth has been removed from any part of any pit excavation area to the maximum extent allowable, . . . such pit . . . shall be *immediately* refilled with clean non-burnable fill." (Emphasis Added) (R. 8)

The Ordinance as amended also required that a written permit be obtained from the Town as a condition of future or continued excavation (R. 6). Appellants failed to comply with these amendments, and the Town then brought this suit to enjoin them from operating the pit until the permit was obtained and all violations of the amended Ordinance had been corrected.

At the trial Appellants introduced uncontradicted evidence that there are a number of ponds and lakes within the Town which are not in compliance with the terms of the Ordinance (R. 99-123, 129-132, 144-148, 158-160 and 161-162); that there never had been a cave-in at the pit (R. 121); and that to refill the pit would require one million cubic yards of earth (R. 203). Appellee introduced no evidence to prove that the new 20 foot berm and 30 degree slope requirements were reasonable or necessary to insure proper lateral support to adjoining landowners, nor did the Town show what change in circumstances made the original fencing requirements insufficient to protect the community.

Notwithstanding, the trial court upheld the Ordinance and the enforcement thereof on the ground that "... the provisions of the ordinance are clearly suited for the curtailment of the obvious dangers" (R. 183).

The Appellate Division, without opinion, affirmed the judgment of the Special Term (R. 195).

The Court of Appeals, three judges dissenting, affirmed the judgment of the Appellate Division (R. 199). In finding the Ordinance to be a valid exercise of Appellee's statutorily delegated police power, the Court syllogizes that since "The hazards to both life and property accompanying the uncontrolled operation of these pits are common knowledge ..." and since Appellants operate a gravel pit ". . . a threat to the community's welfare may at least be said to be 'reasonably apprehended.' (*Wiggins* v. *Town of Somers*, 4 N.Y. 2d 215, 219.) ..." from the presence of Appellants' gravel pit (R. 200). In short, the Court finds the justification for the Ordinance in a judicially noticed "fact," i.e. that sandpits are dangerous, despite Appellants' insistence throughout the proceedings that their operation was not dangerous to the community and despite the record evidence introduced by Appellants to support their position.

IMPLICATIONS OF DECISION TO EXTRACTIVE INDUSTRIES AND TO THE ECONOMY

With increasing frequency owners of gravel pits and stone quarries across the country have seen their once rural locations engulfed by the tide of an expanding urban population. Communities finding such an operation in their midst have reacted to them much as the pioneers did to the Indians whom they encountered in their march across the plains. The Ordi-

nance of the Town of Hempstead is an example, albeit an extreme one, of this municipal viewpoint as manifested in both zoning and regulatory ordinances.

We do not contend that municipal regulation has, in every case, been objectionable. To the contrary, the right of a municipality to enact zoning ordinances and regulations consistent with the state's delegation of such authority and within constitutional limitations is recognized. Moreover, it is appreciated that some regulation of pits and quarries is appropriate and in many cases even necessary. For example, reasonable requirements as to fencing, set-back and dust control hardly can be objected to.

At the same time, it is submitted, regulations should not be permitted to exceed the requirements of the community. On occasion, municipalities have not so restricted their ordinances but have seen fit to enact measures which appear to go well beyond the true requirements of the cases.[2]

A comparison of these ordinances reveals a striking similarity, both in their substantive content and in the

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[2] Consider, for example, the zoning ordinance of West Whiteland Township, Pennsylvania, which became effective on March 9, 1957. West Whiteland is a sparsely-settled, rural community as evidenced both by the map which is part of the Ordinance and by the types of districts into which the ordinance divides the township—three Residential—Agricultural; commercial; and industrial. Article VII, containing the regulations relating to industrial districts states

> ". . . 3. Any other lawful use [is permitted] except the following which are specifically prohibited in any district of West Whiteland Township . . .
> "Asphalt manufacture or refining . . ."
> "Mining . . ."
> "Quarrying . . ."

form in which they are expressed. In the face of the fact that the needs of each community might reasonably be expected to differ from those of other communities this similarity further supports the conclusion that frequently these regulations bear little relation to the health, safety and general welfare requirements of the community; that they are enacted without regard for their effect upon the owner of the mineral interest and the consequences to the community; and in some instances, that they are promulgated for the express purpose of making it difficult, if not impossible, for the extractive operation to survive.[3]

Also attesting to the borderline nature of much of this regulation is the large number of instances in which individual property owners have felt sufficiently oppressed by these ordinances to contest their validity, even in the face of the presumption of constitutionality.[4]

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[3] While this may appear to be a bold contention, support for it is found in the statement of the Missouri Supreme Court. That Court, in striking down such an ordinance, stated: "It sounds well to say that we will presume, in the construction of these laws, that municipal legislators will do their duty honestly and fairly, but in administering them, this Court has continually recognized that they sometimes try, even by frauduent means, while pretending to act within their powers, to exceed and abuse them." City of St. Louis v. Atl. Quarry & Constr. Co., 244 Mo. 479, 148 S.W. 948, 952 (1912).

[4] New York Courts alone have been confronted with a so-called "gravel pit" or "top soil" ordinance on at least 15 occasions within the past 25 years.

In the following cases, the ordinance under consideration was sustained: New York Trap Rock Corp. v. Town of Clarkstown, 3 N.Y. 2d 844, 166 N.Y.S. 2d 92 (1957), appeal dismissed 356 U.S. 582; Bayley v. Adams, 303 N.Y. 967, 106 N.E. 2d 57 (1952); People v. Calvar Corp., 286 N.Y. 419, 36 N.E. 2d 644 (1947); Town of Huntington v. Broad Hollow Estates, Inc., 138 N.Y.L.J.

Generally speaking, the line of demarcation between those ordinances which have been sustained and those held to be invalid has been whether the ordinance under consideration was truly regulatory in nature or whether instead it absolutely prohibited the extraction of the mineral. Where the Ordinances have involved an absolute prohibition, courts, in line with the holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, have been quick to strike them down. *Village of Terrace Park* v. *Errett*, 12 F. 2d 240 (6th Cir. 1926), *cert. denied* 273 U.S. 710; *People* v. *Hawley*, 207 Cal. 395, 279 Pac. 136 (1929); *Ex Parte Throop*, 169 Cal. 93, 145 Pac. 1029 (1915); *Ex Parte Kelso*, 147 Cal. 609, 82 Pac. 241 (1905); *Stone* v. *Kendall*, 268 S.W. 759 (Tex. Civ. App. 1954). In other instances the Court, while sustaining the particular ordinance in question, has made it clear that prohibition of extraction was not involved and that if it had been the result might well have been different. *Miesz* v. *Mayfield*

#55, Sept. 17, 1957 (Sup. Ct. Nassau Co.) not otherwise reported, affirmed 5 App. Div. 2d 851, 172 N.Y.S. 2d 543 (1958); Lizza & Sons, Inc. v. Town of Hempstead, 272 App. Div. 921, 71 N.Y.S. 2d 14 (1947); Town of North Hempstead v. Colonial Sand & Gravel Co., Inc., 14 Misc. 2d 727, 178 N.Y.S. 2d 579 (Sup. Ct. Nassau Co. 1958); Incorporated Village of Upper Brookville v. Faraco, 282 App. Div. 943, 125 N.Y.S. 2d 214 (1953); Krantz v. Town of Amherst, 192 Misc. 912, 80 N.Y.S. 2d 812 (Sup. Ct. Erie Co., 1947); People v. Gerus, 69 N.Y.S. 2d 283 (1942); Post Brick Co. v. Thompson, 68 N.Y.S. 2d 159 (Sup. Ct. Nassau Co. 1939); Burroughs Landscape Constr. Co. v. Town of Oyster Bay, 186 Misc. 930, 61 N.Y.S. 2d 123 (Sup. Ct. Nassau Co. 1946).

In these cases the ordinance was held to be invalid: Town of Somers v. Camarco, 308 N.Y. 537, 127 N.E. 2d 327 (1953); Lizza & Sons, Inc. v. Town of Hempstead, 175 Misc. 383, 23 N.Y.S. 2d 811 (Sup. Ct. Nassau Co. 1940); Town of Harrison v. Sunny Ridge Builders, 170 Misc. 161, 8 N.Y.S. 2d 632 (Sup. Ct. Westchester Co. 1938).

Heights, 92 Ohio App. 471, 111 N.E. 2d 20 (1952); *People* v. *Calvar Corp.*, 286 N.Y. 419, 36 N.E. 2d 644 (1947); *People* v. *Gerus*, 69 N.Y.S. 2d 283 (1942). No case has been found which sustains an ordinance—zoning or regulatory—absolutely prohibiting the further extraction of sand and gravel or crushed stone by a property owner who was engaged in such extraction prior to the passage of the ordinance.[5]

The Ordinance here differs from the cases of absolute prohibition only in that it does not, by its terms, prohibit the removal of sand and gravel. But, as has been pointed out (*supra*, pp. 2, 3), the necessary effect of the Ordinance as applied to appellants' existing operations is to prohibit the further removal of sand and gravel (at least from the 20 acres which are already below water level) as surely as if the Ordinance on its face contained an absolute prohibition.

Should this Court sustain Ordinance No. 16 as a valid exercise of statutorily delegated police power the ramifications for our industry will be widespread, transcending the immediate effect upon these Appellants.

The individual property owner extracting minerals from his property, whether it be stone, sand, oil, coal,

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[5] Some cases do uphold zoning ordinances prohibiting the expansion of an existing quarrying or gravel operation to an area in which the extraction was *not* being carried on at the time of the passage of the ordinance. Township of Bloomfield v. Beardslee, 249 Mich. 296, 84 N.W. 2d 534 (1957); New York Trap Rock Corp. v. Town of Clarkstown, 3 N.Y. 2d 844, 166 N.Y.S. 2d 92 (1957) appeal dismissed 356 U.S. 582; Town of Seekonk v. McHale & Sons, 325 Mass. 271, 90 N.E. 2d 325 (1949); Burlington v. Dunn, 318 Mass. 216, 61 N.E. 2d 243 (1945); West Brothers Brick Co. v. Alexandria, 160 Va. 271, 192 S.E. 881 (1937), appeal dismissed 302 U.S. 658, rehearing denied 302 U.S. 781.

or some other mineral, will be deprived of his last remaining protection—the assurance that, regardless of the extent to which his operations are regulated, he will not be prohibited from continuing such an operation without payment of just compensation.

The tendency of communities to employ similar language to express their requirements has been pointed out. It is not unreasonable to conclude that if Ordinance No. 16 is upheld other communities will follow appellee's example, finding in the language of the Ordinance the "final solution" to their problem. The inevitable effect of this Ordinance becoming the prototype for "regulation" of quarries will be a substantial reduction in the number of these operations. Not only the individual mineral owner, but the community as well, will be the loser if valuable deposits of these resources are forever entombed. The conclusion of the Massachusetts Supreme Court in *City of Pittsfield* v. *Oleksak*, 317 Mass. 553, 47 N.E. 2d 930 (1943), is certainly as relevant to minerals as it is to timber. As the Court declared (47 N.E. 2d at 932):

> "In the present instance, on the facts found, the application of the ordinance to stop the defendant's activities would permanently deprive the defendant, *and therefore the community,* of a valuable and otherwise wasting asset . . ." (Emphasis Added)

Moreover, such a result will discourage new quarrying ventures, for no realistic businessman with capital to invest will be likely to enter the field when it becomes known that the business in which he is considering investing is not only subject to regulation but, on whim or caprice of municipal regulatory bodies, to confiscation as well.

ARGUMENT

I. Appellants Were Denied Due Process When the New York Courts Took Judicial Notice of the Sole Determinative and Controverted Fact

It is submitted that it is within the framework of the foregoing discussion that the Court of Appeals' decision, upholding amended Ordinance No. 16 as a valid exercise of statutorily delegated police power, must be reviewed.

The recognized test for determining the constitutionality of such a regulation was well stated by the Supreme Court of Michigan recently in the case of *Township of Bloomfield* v. *Beardslee,* 249 Mich. 296, 84 N.W. 2d 534, 540 (1957):

> "In each case the question is whether, *on the peculiar facts before us,* the ordinance is a reasonable regulation in the interests of the public good, or whether it is an arbitrary and whimsical prohibition of a property owner's enjoyment of all of the benefits of his title." (Emphasis Added)

In the case at bar the decision of the Court of Appeals disregards the facts of record and rests instead on matters asserted to be "common knowledge." These matters were controverted by Appellants, were inconsistent with the facts of record and are believed to be beyond the scope of judicial notice. It may be true, as the Court declares (R. 200), that the dangers ". . . accompanying the *uncontrolled* operation of these pits are common knowledge . . ." (Emphasis Added). But to conclude as a matter of fact that since an *uncontrolled* pit is dangerous a regulated pit will be equally dangerous is clearly a *non sequitur.*

It is a well recognized principle of law that a court has the power to take judicial notice of those facts

which are of common and general knowledge, are not doubtful or uncertain and are within its jurisdiction. 20 Am. Jur. *Evidence*, Sec. 17 (1939). In other words, a court may take judicial notice of those facts which are so notorious that they will not be disputed. See 9 Wigmore, *Evidence*, Sec. 2567 (3d Ed. 1940). But as this Court stated in *Brown* v. *Piper*, 91 U.S. 37, 42-43:

> "This power is to be exercised by Courts with caution. Care must be taken that the requisite notoriety exists. *Every reasonable doubt upon the subject should be resolved promptly in the negative.*" (Emphasis Added)

It hardly can be said that the "requisite notoriety" exists as to the dangers attendant to the operation of this pit when three judges of the Court below take unequivocal exception to the "fact" judicially noticed, stating to the contrary that "There is nothing inherently dangerous or evil about this business, nor about excavating under water . . ."[6] That a particular gravel pit is not dangerous, *per se*, has also been concluded in other cases. The Texas Court of Civil Appeals in *Stone* v. *Kendall*, 268 S.W. 759 (Tex. Civ. App. 1925), in finding a municipal ordinance prohibiting the excavating of gravel to be "an arbitrary and unwarranted limitation upon the lawful use of property," comments:

> "Can it be said that the excavation, removal and sale of gravel by appellees in the operation of said gravel pit will in itself necessarily, or even probably, injuriously affect the health, safety, comfort or welfare of the inhabitants of said city? We think not." 268 S.W. at 761.

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[6] Even the Appellee Town candidly admits, at page 18 of its brief before the Court of Appeals, that ". . . sandpit operations are not intrinsically evil."

The Town made much at the trial of the fact that Appellants' fenced pit is situated in the midst of a large number of homes and that several thousand children attend school in the area (R. 25-34).[7] But as was pointed out by several witnesses, there are a number of sumps, ponds and lakes in the area encompassed by the Ordinance which are not in compliance therewith (R. 99-123, 129-132, 144-148, 158-160 and 161-162). The trial court, in recognizing the existence of these unfenced bodies of water, states "The defendants have failed to show whether these excavations and bodies of water were private, governmental, abandoned or in use" and "None of these were shown to be presently operated or operating sand pits, against which the ordinance is directed" (R. 185). The ownership of an unfenced body of water and the manner in which it was created do not bear on the dangers inherent in its existence. Surely the dangers to the community from a fenced body of water which coincidentally is a gravel pit are no greater than the dangers of unfenced and unguarded bodies of water naturally formed.

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[7] The very fact that the multitude of families represented by the several thousand children of their own free will and volition, chose to purchase or rent homes in close proximity to the Appellants' gravel pit tends to rebut the contention that its existence constituted a hazard requiring further regulation. Particularly significant in this regard is the fact that many of these families located in the area before the gravel pit was fenced, indicating that, at least to some, even an unfenced body of water is not inherently dangerous.

That the existence of even an unguarded and unfenced body of water is not universally regarded as being detrimental to the safety of a community—even a densely populated one—is apparent from the situation in Orlando, Florida. Within its city limits there are 54 lakes, not one of which is fenced. The Chamber of Commerce points with pride to these lakes, many of which *are* in densely populated areas.

If, as is contended, the dangers attendant to the operation of a fenced and regulated pit are not "obvious" and are not matters of "common knowledge," the judgment of the Court of Appeals cannot stand.

Judicial notice obviates the need for proof of a given "fact." Coincidentally, it cuts off the opportunity to establish the contrary of the supposed "fact." When properly employed judicial notice effects desirable savings in trial time, When improperly employed, it subverts the entire trial process. Notice of issues, confrontation of witnesses, opportunity for hearing before an impartial tribunal and all other characteristics of our adversary system of adjudication are empty formalities if at the conclusion of the process the trier may "notice" the single, controverted fact on which disposition of the case depends. Thus misused, judicial notice denies due process. See *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 302.

We submit that the New York courts had the duty, in determining the constitutionality of Ordinance No. 16, to consider the facts before them on the issue of "danger." As was succinctly stated by this Court in *United States* v. *Carolene Products Company*, 304 U.S. 144, 153:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts *beyond* the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . ." (Emphasis Added)

Had the New York courts not arbitrarily disregarded the testimony of sworn witnesses, they would have found *in the record* uncontradicted evidence (1) that there had never been a cave-in at the pit (R. 121); (2) that Appellants had completely enclosed the

pit with 7,000 lineal feet of six-foot, chain-link fence, topped by barbed wire and were otherwise in compliance with Ordinance No. 16 as originally enacted (R. 82, 138 and 140); and (3) that since the original enactment of Ordinance No. 16 Appellants' safety record had been unblemished. Moreover, they would have found a total absence from the record of any change in circumstances making necessary the amendment of Ordinance No. 16.

In short, a consideration of the evidence leads to the conclusion that, contrary to there being "obvious dangers" attendant on the operation of Appellants' gravel pit, there were no hazards accompanying its operation, either to persons or to property. It seems clear, then, that the substitution of judicial notice for a consideration of the facts of record deprived the Appellants of due process. *Ohio Bell Telephone Co.* v. *Public Utilities Commission, supra.* The statement of Mr. Justice Cardozo in that case is particularly relevant here:

> "[T]o press the doctrine of judicial notice to the extent attempted in this case and to do that retroactively after the case had been submitted, would be to turn the doctrine into a pretext for dispensing with a trial." 301 U.S. at 302.

Only recently, in *Speiser* v. *Randall,* 357 U.S. 513, this Court held that a California statute denied procedural due process because it imposed on the taxpayer the burden of establishing his "loyalty" as a condition of receiving a certain tax exemption. That case involved an abridgement of First Amendment rights which the present case does not. Nonetheless, the property right at stake in the case at bar is believed to be a sufficiently important one to invoke the principle

underlying the *Speiser* holding; namely, that where state action threatens constitutional rights care must be taken to assure that maximum procedural safeguards are observed. It is submitted that the taking of judicial notice of the "fact" which determines the outcome of the litigation does not comport with this principle.

On this ground alone, the judgment of the Court of Appeals should be reversed and the case should be remanded to the state courts for a determination of the question whether actual rather than presumed dangers arise from the operation of Appellants' sand pit.

II. Absent a Real Necessity, Ordinances Such as Ordinance No. 16 are Unreasonable and Arbitrary as Applied to Enterprises Engaged in the Exploitation of a Natural Resource

Appellee apparently will assert that Ordinance No. 16, as amended, is a safety regulation reasonably adapted to the need of the local community to be protected from a hazardous condition. Appellee has insisted in this litigation that it seeks only to compel appellants to comply with the substantive provisions of the Ordinance and to procure the required permit as a condition to future operations. The Court of Appeals accepted these contentions holding that Appellee has power to protect its inhabitants from dangers "reasonably apprehended" and that:

> "The minimal safety standards currently required by the Town of Hempstead have not been demonstrated under the circumstances here to be an unreasonable means to accomplish this end."

As we read Ordinance No. 16 it has the effect of prohibiting Appellants from carrying on their business. So read, we believe the Ordinance to be unreasonable.

We submit that a regulation having so heavy an impact on the property rights of the individual can be regarded as "reasonable" only when it is made to appear that prohibition is the sole feasible means to achieve an appropriate community objective. No such circumstance appears on this record.

We are aware that regulations prohibiting the continuance of otherwise legitimate businesses in given areas or restricting the pursuit of otherwise lawful occupations have been upheld by this Court on a number of occasions.[8] None of these cases, however, has presented for decision the application of such a regulation to the exploitation of a natural resource; and *Hadacheck* v. *Sebastian*, 239 U.S. 394, recognizes that there may be a basis for distinguishing the latter case from those involving other types of economic endeavors. In *Hadacheck* a municipal ordinance was upheld which forbade the manufacture of bricks in a particular area of a large city. The Court noted, however, that (at 412):

> "In the present case there is no prohibition of the removal of the brick clay; only a prohibition within the designated locality of its manufacture into bricks. And to this feature of the ordinance our opinion is addressed. Whether other questions would arise if the ordinance were broader, and opinion on such questions, we reserve."

We believe that there are three factors, unique to natural resource industries, which strongly suggest that special principles should apply in determining whether a regulation which prohibits the further ex-

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[8] E.g., Reinman v. Little Rock, 237 U.S. 171; Hadacheck v. Sebastian, 239 U.S. 394; Breard v. Alexandria, 341 U.S. 622; United States v. Carolene Products Co., 304 U.S. 144.

ploitation of a natural resource is "reasonable." First is the nature of the interest of the owner of a mineral deposit. Second is the national interest in the maximum utilization of our natural resource heritage; and third is the relatively more limited opportunity of the natural resource concern to relocate economically.

We develop the first point in Part III of our argument where we deal with the failure of Ordinance No. 16 to provide for the payment of just compensation. Suffice it to say here that a mineral interest is an independent property interest, capable of being severed from the ownership of the surface lands which overlie it. Regulations such as Ordinance No. 16, as amended, which prohibit the exploitation of that mineral interest, completely destroy the value of this subsurface property. Thus, they differ significantly from regulations which merely limit the *use* of surface property. We believe that an ordinance or other regulation which has substantially the effect of confiscating the property of an individual requires a greater degree of justification than one which merely limits the use of property.

Preservation of our natural resource heritage and the difficulty of relocating a natural resource concern are related points. The business of extracting minerals can not be conducted everywhere; it can only be engaged in where minerals are found. In this connection, it needs to be emphasized that deposits of stone, sand and gravel are limited. The situation regarding stone is summarized as follows in Mineral Facts & Problems, 1960 Edition, Bulletin 585, a publication of the Bureau of Mines, U. S. Department of the Interior (at 807):

> "Reserves in the United States are large, but unevenly distributed; moreover, stone deposits of the quality required by present specifications are defi-

nitely limited in many areas. Usable deposits are restricted to areas in which the products can compete favorably with substitute materials. The expense of transportation from plant to point of use is therefore a limiting factor in determining available commercial reserves. Shortage of available reserves near some metropolitan areas is becoming acute because existing deposits are being rapidly surrounded by growing suburban populations, and the consequent zoning restricts expansion and in some cases forces the producer out of business."[9]

Demand for crushed stone, sand and gravel has been growing at a remarkable rate in recent years. In 1958 domestic production of these minerals exceeded one billion two hundred million tons. Of this amount, crushed stone constituted 535 million tons. By comparison, in that year United States production of all other minerals combined amounted to only 687 million tons. (Pit & Quarry Handbook, 53d Edition, Published by Pit & Quarry Publications, Inc., Chicago, Illinois, at G-3.)

In 1959, 582 million tons of crushed and broken stone valued at $824 million were produced, an increase of 9 percent over the production of the previous year. Some idea of the myriad uses and importance of crushed stone can be gained from the following chart, prepared by the Bureau of Mines and appearing in Volume I, Minerals Yearbook, 1959 at 1005.

[9] The same shortages exist as to sand and gravel. Mineral Facts and Problems, *supra* at 710.

CRUSHED AND BROKEN STONE SOLD OR USED BY PRODUCERS IN THE UNITED STATES, BY USES
(Thousand short tons and thousand dollars)

Use	1959 Quantity	Value
Agriculture	20,819	$ 36,038
Cement	91,010	96,901
Concrete and roadstone	356,751	477,663
Fill	4,895	4,971
Filtration	316	665
Flux[10]	28,633	41,682
Glass	1,636	4,798
Lime and dead-burned dolomite	20,517	31,834
Mineral food	658	3,601
Poultry grit	1,059	8,586
Railroad ballast	11,314	12,739
Refractory	953	7,192
Riprap	17,251	21,261
Roofing granules, aggregates, and chips	1,863	11,088
Stone sand	3,973	5,163
Terrazzo	620	6,170
Other uses and unspecified	19,451	54,059
Total	581,721	$824,411

On this enormous existing, and growing, demand there will now be superimposed the requirements of the construction program authorized by the Federal-Aid Highway Act of 1956. It is estimated that this program when completed "will have required an addi-

[10] Metallurgical grade limestone is used as a fluxing agent in the steel making process. Its significance in the process is reflected in the conclusion of Kenneth K. Landes, a recognized authority in the field, that:

> "High quality (metallurgical grade) limestone is just as essential to the making of steel as iron ore; it is also necessary for the burning of lime and for the manufacture of many chemicals." Hearings on the Revenue Revision of 1951 before the House Committee on Ways and Means, 82nd Cong., 1st Sess. at 1555 (1951).

tional 10 billion tons of aggregate[11] over and above the expanding normal requirements." Mineral Facts & Problems, *supra*, at 701.

The recent increase in the demand for crushed stone and similar products has had a significant effect on the availability of economically located deposits of rock and sand. Anticipated shortages of these minerals have caused established companies to buy up the more favorably located deposits in metropolitan areas. Many of these deposits cannot be economically exploited at this time. Their development must await the exhaustion of deposits still more favorably located.

Thus, the smaller producer who loses his only deposit through municipal regulation often finds his competitors in control of the deposits which are essential to his economic survival. In antitrust terminology, ease of entry is no longer characteristic of the crushed stone industry—particularly in and around the larger metropolitan areas.

Thus, regulations such as Ordinance No. 16 are triply unfortunate in their application. They confiscate private property and destroy a going business causing severe economic hardship to the owner, the employees and all persons dependent upon the business for their livelihood. They reduce competition in a market in which demand is rising sharply and are, thus, adverse to the long-range interests of the community *qua* consumer. Finally, they deplete the nat-

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[11] Aggregate has been defined by the American Society for Testing Materials as ". . . designated inert material which when bound together into a conglomerated mass by a matrix forms concretes, mastic, mortar, plaster, etc." ASTM Standards on Mineral Aggregates and Concrete (9th Ed. 1960).

ural resource reserve of the nation at a time when aggressive and effective conservation measures are fast becoming a condition of national survival.

Some of these considerations have undoubted political overtones. We do not suggest that the courts should, or could, undertake to sit in review of the legislative judgment on such matters. We do say that these are the economic and political realities which form the backdrop against which the courts must perform their function under the Fourteenth Amendment of determining what is a "reasonable" exercise of the police power. In the light of these realities, we submit, it is appropriate and desirable that the burden should be upon the proponents of an ordinance such as amended Ordinance No. 16 to establish that no means to attain an appropriate community objective was available other than outright prohibition of the continued exploitation of a natural resource.[12] Such a rule would strike a balance between the vital but parochial interests of the local community and the national interest in the full utilization of our limited reserve of natural resources. It would also afford protection against oppressive uses of the police power such as the

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[12] Such a rule *has* been suggested by other courts. Terrace Park v. Errett, 12 F. 2d 240 (6th Cir. 1926), *cert. denied* 273 U.S. 710; City of North Muskegon v. Miller, 249 Mich. 52, 227 N.W. 743 (1929); Certain-teed Products Corp. v. Paris, 351 Mich. 434, 88 N.W. 2d 705 (1958). As was so well stated by Justice Black in his concurring opinion in Certain-teed, *supra*, 88 N.W. 2d at 722:

> "If an ordinance . . . projects its regulatory tentacles toward nether regions, the proponent side of the debatable question [whether the ordinance can be sustained] is considerably weakened and the contestant voice is correspondingly strengthened . . . To sustain the ordinance in such a case *there must be some dire need* . . ." which the ordinance is designed to fill.

application to Appellants of Ordinance No. 16 appears to be on the record of this case.

The rule would not be inconsistent with the prior decisions of this Court. Indeed, it is foreshadowed in some respects by *Hadacheck, supra,* and *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, which both recognize that application of regulations such as Ordinance No. 16, as amended, to mineral industries presents unique problems. The rule would restrict local governments to "the necessities of the case . . ." *Welch* v. *Swasey,* 214 U.S. 91, 105, without depriving them of the essential power to take whatever action is truly necessary for the protection of the community.

III. A State or Municipal Regulation Which Prohibits the Continuance of the Exploitation of a Natural Resource and Which Does Not Provide for the Payment of Just Compensation Violates the Due Process Clause of the Fourteenth Amendment

Normally, when a municipal or other local regulation prohibits the conduct of a business within a given area, e.g., *Reinman* v. *Little Rock,* 237 U.S. 171; *Hadacheck* v. *Sebastian, supra,* or imposes on the pursuit of an occupation conditions that may be difficult of fulfillment, e.g., *Breard* v. *Alexandria,* 341 U.S. 622, *Queenside Hills Realty Co.* v. *Saxl,* 328 U.S. 80, *United States* v. *Carolene Products Co.,* 304 U.S. 144, no identifiable property interest can be said to have been taken from the person affected by the regulation. A particular use of land has become unlawful, but the property owner may put his land to other uses. The rooming-house operator must comply with safety regulations that entail considerable expense, but he may still operate his rooming house. Door-to-door solicitation may be restricted, but it is not forbidden. Filled milk

products must be readily distinguishable from whole milk products, but they may still be sold. Presumably, it was considerations such as these which led this Court long ago to hold:

> "Uncompensated obedience to a regulation enacted for the public safety under the police power of the state is not a taking or damaging without just compensation of private propery. . . ." *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226, 255.

On the other hand, it has been pointed out only recently that:

> "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416. In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking . . ." *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155, 168.

We believe that a regulation which prohibits the extraction of minerals falls within the latter class. Mineral interests are recognized as "property" in virtually all states.[13] Moreover, as this Court may judicially

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[13] See, for example, Adams v. Riddle, 233 Ala. 96, 170 So. 343 (1936); Bodcaw Lumber Co. v. Goode, 160 Ark. 48, 254 S.W. 345 (1923); New Haven v. Hotchkiss, 77 Conn. 168, 58 Atl. 753 (1904); Brooke v. Dellinger, 193 Ga. 66, 17 S.E. 2d 178 (1941); Attebury v. Blair, 244 Ill. 363, 91 N.E. 475 (1910); Jensen v. Sheker, 231 Iowa 240, 1 N.W. 2d 262 (1941); Barrett v. Kansas & T. Coal Co., 70 Kan. 649, 79 Pac. 150 (1905); Trimble v. Kentucky Coal Corp., 235 Ky. 301, 31 S.W. 2d 367 (1930); Emery Co. v. Lucas, 112 Mass. 424 (1873); Worcester v. Smith, 117 Me. 168, 103 Atl. 65 (1918); Rathbun v. State, 284 Mich. 521, 280 N.W. 35 (1938); Buck v. Walker, 115 Minn. 239, 132 N.W. 205

notice, there exists an active, national market in such interests which is unrelated to the ownership of the surface lands that overlie the minerals themselves. In the case at bar the mineral interest and the ownership of the fee in the surface lands are joined in Appellants, and this fact may tend to obscure the severable nature of the mineral interest. Indeed, Appellee argued in the state courts and in its Motion to Dismiss the appeal here (at pp. 11 and 14) that Ordinance No. 16 when enforced would still leave Appellants with a valuable piece of real property in a heavily populated urban area. The implication is that the Ordinance has merely restricted the use of Appellants' land and that the case is analogous to those prior instances in which this Court has held such restrictions do not exceed the police power of a local community.

It is true, of course, that a regulation which forbids the extraction of a mineral incidentally restricts the use of the land which overlies the mineral; but the point is irrelevant. The real impact of the regulation falls upon the mineral interest itself. The regulation

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(1911); McNeese v. Renner, 197 Miss. 203, 21 So. 2d 7 (1945); Snoddy v. Bolen, 122 Mo. 479, 24 S.W. 142 (1894); Rist v. Toole County, 117 Mont. 426, 159 P. 2d 340 (1945); Zinc Co. v. New Jersey Franklinite Co., 13 N.J. Eq. 322 (1861); White v. Miller, 200 N.Y. 29, 92 N.E. 1065 (1910); Outlaw v. Gray, 163 N.C. 325, 79 S.E. 676 (1913); Edwards v. McClurg, 39 Ohio St. 41 (1883); Cornelius v. Jackson, 201 Okla. 667, 209 P. 2d 166 (1948), appeal dismissed 335 U.S. 906; Caldwell v. Fulton, 31 Pa. 475 (1858); National Light & Thorium Co. v. Alexander, 80 S.C. 10, 61 S.E. 214 (1908); Murray v. Allred, 100 Tenn. 100, 43 S.W. 355 (1897); Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S.W. 296 (1923); Morison v. American Association, 110 Va. 91, 65 S.E. 469 (1909); Freeport Coal Co. v. Valley Point Mining Co., 141 W. Va. 397, 90 S.E. 2d 296 (1955). We have found no state which holds that mineral interests are not "property."

does not merely limit the use of that interest; it destroys its value completely.

When there are no underlying mineral interests, a regulation prohibiting certain uses of surface lands may or may not constitute a "taking" of property. The regulation—which bars some uses—permits others. A property right is preserved, although diminished in value. Where regulation ends and taking begins in such cases is a matter of degree, *United States* v. *Central Eureka Mining Co., supra,* 357 U.S. at 168. In the case of mineral interests, however, the "property" is, for all practical purposes, the right to extract. See *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 414. To prohibit extraction is to take the property. The parallel respecting surface properties would be a "regulation" forbidding all uses but leaving legal title in the owner in order to avoid the payment of just compensation. Plainly, such a "regulation" would be unconstitutional. See *United States* v. *Causby,* 328 U.S. 256; *United States* v. *Kansas City L. Ins. Co.,* 339 U.S. 799. Cf. *United States* v. *Central Eureka Mining Co., supra,* 357 U.S. at 168.

In addition to these general considerations there are special circumstances disclosed by the record of this case which militate against the validity of Ordinance No. 16. When Appellants began their operations in 1927 the surrounding area was rural in character (R. 178). Gradually, over a period of more than 30 years, a community has grown up about the sandpit so that today the operation is in the center of a densely populated suburb. During the entire period Appellants' sandpit has been there for all to see; there is nothing clandestine about a dredging operation. Now, after all these years, the community asserts that Appellants'

business is a safety hazard and that it must be terminated. Similar cases are not uncommon in our industry.

Assuming that the community's decision is "reasonable,"—which we dispute (see, *infra*, pp. 15 to 22)—the question remains, as Mr. Justice Holmes wrote in *Pennsylvania Coal Co.* v. *Mahon*, *supra*, 260 U.S. at 416, "upon whom the loss of the changes desired should fall." Quite naturally the community seeks to impose the loss upon Appellants. We submit, however, that circumstances of this kind require that the community bear the burden. Simple justice dictates that, if there must be an economic sacrifice for the benefit of the community, the cost should be borne by the community and not be arbitrarily imposed upon an individual.

A contrary holding would threaten our industry with mass confiscation. The stone producer or gravel pit operator whose operation has been engulfed by a new suburban community is *always* in a political minority in defending his right to continue in business. If the community can, without expense to itself, terminate his right to operate and impose upon him additional obligations such as the Town of Hempstead has imposed upon these Appellants, the possibilities across the nation for truly repressive and irresponsible political action against our industry are limitless.

We believe that the due process clause affords protection against just such abuse of the power of a political majority.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, ET AL.,

Appellants,

—VS.—

TOWN OF HEMPSTEAD.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLANTS

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To the extent that Sections 4(h) and 4(j) of the 1958 Ordinance impose civil and property penalties on the appellants in requiring them to stop all business operations and to refill an excavation covering 20 acres which was legally made over a 30 year period; and to the extent that the Ordinance also provides that failure to comply with these Sections of the Ordinance subject appellants to serious criminal penalties of fine and imprisonment (Section 10 of the Ordinance), the Ordinance constitutes *ex post facto* legislation and is a bill of attainder in violation of Article I, Section 10, Clause 1 of the United States Constitution 40

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HERBERT W. GOLDBLATT, ET AL.,

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BRIEF OF APPELLANTS

Reports of Opinions in Courts Below

The opinion of the Trial Court is found in 19 Misc. 2d 176 and 189 N. Y. Supp. 2d 577.

The Appellate Division affirmed, without opinion (9 App. Div. 2d 941 and 196 N. Y. Supp. 2d 573).

The Court of Appeals allowed the appeal on the ground "that a constitutional question is involved upon the appeal" (8 N. Y. 2d 779 and 201 N. Y. Supp. 2d 789).

In the Court of Appeals there was a majority opinion (4 judges) and a dissenting opinion (3 judges), reported in 9 N. Y. 2d 101 and 211 N. Y. Supp. 2d 185.

Jurisdiction

The jurisdiction of this Court is conferred by the provisions of 28 United States Code Section 1257(2). The Court of Appeals of the State of New York is the highest

Court of that State and the order and judgment of that Court affirms the constitutionality of a statute which violates the due process provisions of the 14th amendment and the *ex post facto* and bill of attainder provisions of Article I, Section 10, Clause 1 of the Constitution of the United States.

On June 5, 1961, this Court entered the following order:

> "In this case probable jurisdiction is noted and the case is transferred to the summary calendar."

Statute Involved in This Appeal

Ordinance No. 16 of the Town of Hempstead, as amended on November 25, 1958, is set forth in full on pages 6-9 of the Transcript of Record. The pertinent text of this Ordinance is set forth in the Appendix of this brief (Exhibit 1) and will be quoted at appropriate places in this brief.

Questions Presented for Review

Appellants contend that Ordinance No. 16, as amended on November 25, 1958, violates the Constitution of the United States for the following reasons:

(1) The ordinance violates the due process clause of the 14th amendment because it confiscates and takes away appellants' property and business of excavating and selling sand and gravel without any payment therefor; and the ordinance is not sustainable as a proper exercise of police powers, there being no proof whatsoever of nuisance or danger to support the taking provided for in sections 4(h) and (j) of the ordinance.

(2) Appellants' right to excavate sand and gravel under water existing on their property was expressly adjudicated as a prior nonconforming use in 1956 litigation between the same parties; and to the extent that the 1958 amendment

directly overrules such vested rights obtained by the 1956 judgment the ordinance violates the due process clause of the 14th amendment. There is no evidence to support the reversal of the 1956 judgment by the 1958 legislation or the legality of the 1958 amendment under police powers.

(3) In providing both criminal (section 10) and non-criminal (sections 4(h) and (j)) punishment for doing acts (excavating an area covering 20 acres) which were done legally, openly and with judicial approval, the 1958 amendment to Ordinance 16 constitutes *ex post facto* legislation and is in the nature of a bill of attainder in violation of Article I, Section 10 of the United States Constitution.

Statement of the Case

The appellant Goldblatt is the owner of 38 acres of land located in the Town of Hempstead. The other appellant, Builders Sand & Gravel Corp. (all of whose shares of stock are owned by Goldblatt) was—until enjoined in this action—the operator of the business of excavating and selling sand and gravel taken from this acreage (R. 4). The property was purchased by Goldblatt's father in 1927 and the business of excavating and selling sand and gravel was carried on continuously from 1927 until 1959 when the judgment of injunction was entered (R. 80).

In 1928, only a year after operations began, the excavating had gone below water level and an artificial lake was created (R. 80) in some places to a depth of 40 feet below water level and averaging 25 feet in depth (R. 41). This body of water, therefore, was in existence for over 30 years and appellants' excavation operations had been carried on under this water for 30 years before the 1958 amendment of Ordinance No. 16. Excavating under water is accomplished by hydraulic dredging and is sometimes known as

"wet" excavation, as contrasted with "dry" excavating which is done above water level. Exhibits 6A, 6B, 6F, 6N and 6R introduced in evidence by appellee show appellants' dredging operations.*

The first regulations of the appellee-town covering sand and gravel excavating were made in 1945 when Ordinance No. 16 was originally enacted. These regulations required a 6 foot wire mesh fence and provided for such things as degree of slope and width of berm. Appellants built the 6 foot wire mesh fence topped by 3 strands of barbed wire which now *completely* surrounds appellants' entire property (7000 lineal feet) and appellants otherwise complied fully with the *regulations* of the 1945 Ordinance No. 16 and continued to conduct their underwater excavating and dredging until 1956 when the appellee-town decided to put an end to appellants' business.

No claim was ever made that appellants violated any of the *regulatory* provisions of the original 1945 Ordinance. Not only was no claim ever made in any court—or elsewhere—that appellants' activities were unsafe or constituted a nuisance and, as noted in the dissenting opinion below (R. 204) appellee conceded, upon the oral argument in the Court of Appeals, that it "does not contend that this condition [i.e. underwater excavating] amounts to a nuisance". As we shall presently show (*infra* pp. 25-35): there is no proof that appellants' activities were unsafe, hazardous or obnoxious. To the contrary, the record discloses a lack of any evidence whatsoever that there was ever a single accident, injury or harm to any child or adult on the prem-

* Photographs introduced by appellee (Exhibits 5A-5B and 6A-6U) are photographs of appellants' property and operations. Photographs introduced by appellants (Exhibits B1, B2 and F and G) are *not* photographs of appellants' property but are photographs of other sand pits in Nassau County which appellants introduced to show discrimination by appellee in enforcing the ordinance.

ises in the 31 years of continuous hydraulic operations by appellants.* And there is no showing that there is anything inherently dangerous in the nature of appellants' business or in the method of appellants' operations. The 7,000 lineal feet of six-foot chain link, wire mesh fence, topped by three strands of barbed wire (R. 82-85) which surrounds appellants' property is in excellent condition and has been continuously supervised and maintained by appellants (R. 84, 85).

There is no proof that there were ever any trespassers on appellants' property. The most that appellee Town showed was that there were two small depressions under these 7,000 lineal feet of wire (Exhs. 5A and 5B). There is no proof of how or when these depressions were made and there was no proof that anyone ever entered the premises through these two small openings. The statement in the trial court's opinion (R. 179) that there were "several holes under this fence, evidently dug by children" is unsupported in the record.

There is no evidence that any property damage was ever caused by appellants' operations to neighboring homes or property, nor that there is any current or potential danger to the surrounding property from appellants' hydraulic dredging, or otherwise. To the contrary, the uncontradicted affirmative testimony was that there had never been any "cave-in or tearing away of the bank" or slope of appellants' man-made lake (R. 121); and there was uncontradicted affirmative testimony that the slope or bank surrounding the water is "stable" (R. 122).

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* In its brief in the Court of Appeals appellee referred to an alleged drowning which is supposed to have occurred in 1944, before the Town required fencing. This is an off the record reference (see opinion, R. 206) and will be the subject of comment in our reply brief if appellee reverts to it in its brief in this Court.

Because appellants' activities were not legally subject to attack as a nuisance or the like, appellee's first attempt to terminate appellants' excavating business came in the form of an injunction action, brought in 1956 in the Supreme Court of New York (Nassau County) on the theory that appellants' excavating business violated the zoning ordinance of the appellee-town. After trial, judgment was entered for appellants (Exhibit 3 of Appendix) which expressly provided that appellants have the legal rights of "a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises * * * notwithstanding any ordinances of the plaintiff [appellee]".* The opinion written by the Court in that case (Appendix, Exhibit 2) stated:

> "I find that the defendants [appellants herein] are now and have been since 1927, conducting a prior non-conforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant a continuance of this non-conforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537."

The judgment roll in the 1956 litigation constitutes exhibit "D" in our case on appeal. The testimony in that case is exhibit "I".

In 1957, the appellee-Town brought a second action to enjoin appellants from operating a concrete-mixing operation in connection with their sand and gravel business. That litigation terminated in an injunction preventing appellants from engaging in the concrete business on the ground that it would constitute an improper extension of their non-conforming use (4 App. Div. (2) 970; appeal denied 4 N. Y. (2) 674).

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* No appeal was taken from this judgment.

In 1958, the appellee-town amended ordinance no. 16 to accomplish precisely what it failed to accomplish in the 1956 lawsuit, *viz*: the absolute prohibition of all underwater sand and gravel excavation by appellants. (See Section 4(h) of the Ordinance, discussed *infra*, pp. 13, 14.)

After the litigation of 1956 and 1957 just referred to and before the commencement of this lawsuit (in 1959), appellee-town prepared a drainage map in August 1957 (appellants' Exh. C) which shows the proposed use of appellants' property as part of the Town's plans for a drainage system for surrounding properties. The appellee-town engaged in conferences with appellants, looking forward to the taking of appellants' property by condemnation (Exh. A and cf. R. 331). This proposal to condemn and pay for appellants' property for the public purpose of drainage would have been a constitutional method of eliminating appellants' non-conforming use, adjudicated in the 1956 judgment. (See *Harbison* v. *Buffalo*, 4 N. Y. 2d 553, 564, 575 (1958); *Berman* v. *Parker*, 348 U. S. 26, 36; 10 Syracuse Law Review 214.) However, instead of exercising rights of eminent domain, the appellee-town amended ordinance no. 16 in 1958, doing away with underwater dredging (Section 4(h)) and then brought this third action, in 1959, to enforce the amended ordinance.

Since appellants admittedly operated the only underwater sand and gravel business in Hempstead—and in view of the 1956 and 1957 litigation and events just reviewed—it would appear that the 1958 amendment was directly aimed at them.* At the time the 1958 ordinance was enacted, 20 of appellants' 38 acres were admittedly under water.

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* Judge Van Voorhis finds (R. 204) that the 1958 amendment "was directed at this single operation" conducted by appellants.

Not only does the 1958 Ordinance prohibit all underwater excavating and not only does it directly overrule the 1956 judgment, but section 4(j) of the Ordinance (Appendix, exh. 1) requires appellants to refill the entire excavation (lawfully made 1927-1959) with "clean non-burnable fill". Approximately 1,000,000 cubic yards of fill have been removed in appellants' 30 year operations (R. 63) so that the cost of refilling would be approximately $1,000,000.

The 1958 amendments (Section 10) also provides for punishment by fine (of not more than $500) or imprisonment (for a period not exceeding six months) or both, for each offense; and provision is made that "each week's continued violation shall constitute a separate additional violation".

Appellants' removal of sand and gravel under water is admittedly in direct violation of the 1958 ordinance (section 4(h)) which prohibits such excavations and therefore, if the judgment below (which holds the 1958 Ordinance constitutional) is affirmed by this Court, appellants are not only prohibited "unconditionally and finally" from excavating and carrying on their business of "underwater dredging previously conducted on 20 acres of [appellants] property" (opinion of Van Voorhis, J., R. 203) but they are required (by section 4(j)) to spend $1,000,000 to fill the excavation lawfully created, under criminal penalties (section 10).

Appellants' first pleading (R. 11) raised the constitutional issues involved herein.

After trial, judgment was entered (R. 12-14) granting the injunction, based on a holding of constitutionality of the 1958 ordinance.

The judgment of the Trial Court was affirmed by the Appellate Division of the Supreme Court, without opinion (R. 194, 195).

The Court of Appeals affirmed. Both the majority and minority opinions expressly state that the main issue involved on the appeal was the constitutionality of Ordinance No. 16 as amended in 1958.

The first sentence of the majority opinion (4 judges concurring) states (p. 199):

> "The question raised is whether an ordinance of the Town of Hempstead regulating the defendants' business is confiscatory and in violation of the due process clause of both the Federal and State Constitutions."

The dissenting opinion (3 judges concurring) concludes that Ordinance No. 16 not only violates the due process clause of the 14th amendment of the United States Constitution, but also states (R. 203) that the ordinance "may well be regarded as oppressive, and condemned by the constitutional prohibition against ex post facto laws (U. S. Const., art. I, § 10)".

Further facts pertinent to the issues of law involved on this appeal will be stated in the discussion of such issues.

Summary of Argument

(I) Appellants admittedly have the legal rights of a prior non-conforming use which permits and authorizes appellants to excavate and sell sand and gravel taken from their property covering 38 acres, 20 of which are under water. This right of a prior non-conforming use was established in a 1956 lawsuit brought by the appellee against appellants for an injunction to prevent appellants from continuing their excavation business. A copy of the judgment in the 1956 litigation is attached to this brief as exhibit 3.

In 1958 appellee amended its Ordinance No. 16 to provide (sections 4(h) and (j)) that appellants may no longer do exactly what the 1956 judgment permits, to wit: excavating sand and gravel on appellants' property. This is absolute prohibition and confiscation of appellants' property and their vested, legal right to use (as a non-conforming use) the property for excavating and selling sand and gravel. This is a taking and wiping out of a prior non-conforming use, without due process, in violation of the 14th amendment (*Town of Somers* v. *Camarco*, 308 N. Y. 537; *Harbison* v. *City of Buffalo*, 4 N. Y. (2) 553; 44 *Cornell Law Q.* 450, 453).

The ordinance cannot be sustained as a proper exercise of police powers because the ordinance does not provide reasonable *regulations* governing excavating operations but to the contrary provides (sections 4(h) and (j)) for absolute termination of excavating and the refilling of the excavation legally made over a period of 30 years. Not *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80 (*regulations* of lodging houses) but *Pennsylvania Coal* v. *Mahon*, 260 U. S. 393 (prohibition of mining coal) governs this case on appeal. There is no evidence to support the *prohibition* of excavating as a valid exercise of police powers since appellants' excavating activities do not constitute a nuisance, danger or hazard to the community.

The constitutional method of accomplishing appellee's purpose of eliminating appellants' non-conforming use of excavating is by "eminent domain" (*Pennsylvania Coal* v. *Mahon*, 260 U. S. at p. 413). In any event, the purpose cannot be accomplished by "arbitrary fiat" (*Village of Euclid* v. *Amber Realty*, 272 U. S. 365, 389) represented by appellee's 1958 amendment to Ordinance No. 16, after appellee lost its 1956 litigation.

(II) Insofar as the 1958 amendment to Ordinance 16 directly overrules vested rights of appellants "established by a solemn judgment" (*Massingill* v. *Downs*, 48 U. S. 760, 768) obtained in 1956 (Appendix, exh. 3) the ordinance violates the due process clause of the 14th amendment.

(III) The 1958 amendment to Ordinance 16 is a legislative act directly aimed at eliminating appellants' property and business and provides both criminal penalties (fine and imprisonment, section 10 of Ordinance 16) and non-criminal punishment (sections 4(h) and (j)) for doing those acts (i.e. excavating over 30 years) which were legal when done. Accordingly, the 1958 amendment constitutes (a) a bill of attainder and (b) *ex post facto* legislation, both in violation of article I, section 10 of the United States Constitution (*Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277; *Ex parte Garland*, 4 Wall. (71 U.S.) 333; *U. S.* v. *Lovett*, 328 U. S. 303; *Flemming* v. *Nestor*, 363 U. S. 603).

THE ARGUMENT

POINT I

The 1958 Amendment of Ordinance No. 16 totally prohibits appellants' use of their land and excavating business and wipes out appellants' vested rights in their prior non-conforming use of excavating and selling sand and gravel which was adjudicated in the 1956 litigation. The Ordinance is not regulatory but prohibitory and confiscatory and constitutes a taking without payment and in violation of the due process provisions of the 14th Amendment.

The difference in the conclusions reached in the majority and minority opinions below is due to a difference in the interpretation given to the meaning and requirements of Section 4(h) and 4(j) of the ordinance, as amended in 1958.

The majority opinion adopts the unrealistic view that the 1958 amendments constitute only *regulations* of how appellants shall conduct their sand and gravel business. This opinion states that the 1958 amendments do *not* "proscribe" but "merely" regulate and provide "conditions" for "future operation" of excavating by appellants (R. 200). Based on this premise that the ordinance merely *regulates* appellants' activities, the majority opinion (citing *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80, and *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370, cert. den. 360 U. S. 902) reaches the conclusion that the ordinance is constitutional, as a proper exercise of the Town's police powers.

The minority opinion finds that the 1958 ordinance does proscribe and does prohibit all excavating of sand and gravel under the water located on 20 acres of appellants'

property and reaches the conclusion that this is a total taking and confiscation of property, without compensation (under the holding in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393) in violation of the due process clause of the 14th amendment.

The foregoing summary of the reasoning and *rationale*, expressly stated in the opinions below demonstrates that the crux of the main constitutional issue posed on this appeal is whether Ordinance No. 16 does prohibit or only regulates appellants' excavating activities. Since no compensation or payment is provided for, it would appear that if Ordinance No. 16, as amended in 1958, does "proscribe" then the ordinance is confiscatory and unconstitutional. Accordingly, we go directly to this main issue.

Section 4(h) of the 1958 ordinance (printed in full, R. 7-9) provides:

> "No excavation shall be made below two feet *above* the maximum ground water level at the site." (Emphasis added.)

It is agreed that the average depth of the water on appellants' property is approximately 25 feet *below* "maximum ground water level". It follows that there can be no denial of the essential fact that appellants' excavation has reached a point 27 feet *below* the level at which excavating is permitted by the ordinance, viz: "2 feet *above* • • • ground water level."

The point is so important in the analysis of the problem involved on this appeal that we ask the Court's indulgence to repeat this major factual situation in another way: Section 4(h), by its very terms, prohibits any excavation "*below* 2 feet above the maximum ground water level at the site". This is a clear and unambiguous statement that

all excavating *below* water level is prohibited absolutely. The indisputable and agreed fact is that appellants' operations are, on average, 25 feet *below* water level. Accordingly, Section 4(h) expressly makes illegal the continuation of any excavation under the water existing on appellants' property; and the judgment of injunction prohibits any future excavation since the "pit has been excavated substantially beyond points 2 feet above the maximum water levels" (R. 14).* Since the entry of judgment in July 1959, no excavation has taken place.

Not only does section 4(h) totally and absolutely prohibit all future excavation under the artificial lake, lawfully created on appellants' property over the period from 1927 to 1959, but section 4(j) of the ordinance (and the injunction which sustains the ordinance, R. 14) require appellants to fill the entire excavation under water, covering 20 acres, "with clean, non-burnable fill". Section 4(j) of the ordinance provides:

> "When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance * * * such pit or part thereof shall be immediately refilled with clean, non-burnable fill * * * and the premises after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads".

In view of the fact that appellants may no longer excavate their property under water (section 4(h)) and must also refill (section 4(j)) this entire excavation (cov-

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* We agree with the following statement of counsel for appellee (R. 16): "* * * approximately 20 acres are land under water with an average depth of approximately 25 feet * * * this is water *all below the maximum ground water* level." (Emphasis added.)

ering 20 acres) it is submitted that the following stated major premise of *"regulation"*, adopted in the majority opinion of Judge Burke, cannot be sustained (R. 200):

> "Neither the injunction granted nor the ordinance proscribes any future excavation. The injunction merely conditions future operations upon the issuance of a permit from the Town of Hempstead and the correction of certain violations of the ordinance."

The majority opinion also says (R. 200):

> "It is not the function of the courts * * * to determine the 'reasonableness, wisdom and propriety' of the regulations."

The opinion cites *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (a case involving *regulation* of trucks on highways); and also says (R. 200) that this Court has sustained *"regulatory"* provisions involving "preexisting uses", citing *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80 and *Matter of Engelsher* v. *Jacobs*, 5 N. Y. 2d 370 (cert. den. 360 U. S. 902).*

The foregoing fundamental assumption of "regulation", is erroneous as a matter of law. Appellants *cannot* comply with sections 4(h) and (j) of the 1958 ordinance which prohibit all future excavation under water. The only way appellants can comply with the requirement of sections 4(h) and (j) is to desist and stop forever all future excavation. This is total prohibition, not "merely" regulation, of excavating activities. The statement of Judge Burke (R. 200) that the judgment of "injunction merely conditions future operation upon the issuance of a permit from the Town of Hempstead, and the correction

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* These cases are discussed *infra* pp. 18, 19.

of certain violations of the ordinance" is unreal and cannot be supported because (1) no permit will be issued until appellants comply with sections 4(h) and (j) which *prohibit* all underwater excavation and (2) appellants cannot correct "violations of the ordinance" except by not excavating under water.

The majority opinion does not cite or discuss the provisions of sections 4(h) or 4(j) of the ordinance. The majority conclusion is essentially based upon the principle that there is a presumption of constitutionality of regulatory legislation enacted under police powers to protect the community. In the first place, the 1958 ordinance is *not* regulatory and secondly, any presumption of constitutionality was overcome, see *infra* pp. 25-35.

The dissenting opinion of Judge Van Voorhis analyzes sections 4(h) and (j) which prohibit all underwater dredging and requires refilling, and comes to the conclusion (R. 203) that "the theory of 'regulation' cannot reasonably be sustained," citing the statement of Mr. Justice Holmes in the *Pennsylvania Coal* case, often quoted by this Court (cf. *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168, 184) that "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."

Because the provisions of sections 4(h) and (j) of the ordinance are so clearly prohibitive of all excavation under water* appellee has resorted to the argument, adopted in the majority opinion (R. 200), that since 18 acres of appellants' property is not yet under water, the ordinance is not confiscatory with respect to the 20 acres under water. The majority opinion of Judge Burke adopting this thesis,

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* To the extent that appellee recognizes the prohibitory nature of sections 4(h) and (j) appellee is in disagreement with the majority opinion which proceeds on the premise that the ordinance is "merely" regulatory.

stated (R. 200, fol. 263): "There are approximately 18 acres which are available for excavation."

We believe the statement itself of the foregoing proposition refutes the propriety or reasonableness of the contention that because only 20 acres—a little more than half of appellants' property—is taken, it does not constitute a taking, in violation of the due process clause. Even assuming, *arguendo*, that appellants might conduct other activities on *other* portions (18 acres) of their property that would be no answer to the immediate taking of the 20 acres under water. Actually the assumption is inapplicable in our case because that part of appellants' property (18 acres) which is not already under water is used by appellants in the processing (i.e. washing and screening) and the storing of materials which are excavated from the acreage under water. Photographic exhibits (Exhibits 2, 6G and 6P) demonstrate the necessary and close interrelationship, in appellants' business, between the 20 acres where hydraulic dredging takes place and the remainder of the property (18 acres) adjoining the water, where processing activities take place.

Furthermore, the requirement of the ordinance (section 4(h)) that no excavation shall proceed to a depth lower than "2 feet above maximum ground water level" means that there can be no substantial excavation even on the 18 acres not yet under water, because these 18 acres are substantially at water level. Exhibit 3, a topographical survey plot of the site, shows that the 18 acres are so close to ground water level that no substantial excavation can take place under section 4(h) of the ordinance.

The argument that the taking of 20 acres is not a taking because appellants own 18 additional acres, is a *non sequitur*, erroneous in logic and in law.

Because appellee was unable to argue away the prohibitory and confiscatory nature of section 4(h) appellee argued in one of its briefs in the Court of Appeals,* that "the ordinance as applied to the defendants [appellants] is not confiscatory" because appellants might use or convert their property "into a recreation area with park and boating facilities and the like." Appellee concluded (p. 11 of its brief): "The ordinance does not appear to preclude that possibility." When appellants pointed out that this contention (a) overlooks the requirement of section 4(j) that the lake be refilled and (b) is contradictory to appellee's major—but false—premise that water is dangerous *per se* (see *infra* p. 29), appellee discontinued the argument in subsequent briefs.

We do not know whether appellee will resurrect the foregoing argument in this Court, but we restate it here to demonstrate the speciousness of any argument that there is any use, other than excavating, which can be made of appellants' property; and sections 4(h) and (j) which prohibit that only use is a complete taking, in violation of the 14th amendment.

The decisions in the *Saxl* and *Jacobs* cases (cited and relied on in the majority opinion, R. 200) are totally inapplicable because the ordinances involved in those cases "were truly 'regulatory' ordinances which did not operate to confiscate and prohibit absolutely" (R. 203). In the *Jacobs* case (5 N. Y. 2d 370, cert. den. 360 U. S. 902) the ordinance regulated the number of beds which could be put in hospital rooms of certain sizes. There was nothing in the ordinance which prevented the hospital from carrying on its business.

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* This brief was submitted in opposition to appellants' motion to appeal to the Court of Appeals (see 8 N. Y. (2) 779).

Likewise, in the *Saxl* case (328 U. S. 80) this Court sustained state legislation regulating and requiring an automatic sprinkler system in lodging houses in New York City. However, the ordinance in the *Saxl* case did not prohibit the business of conducting a lodging house.

Ordinance No. 16 wipes out and eliminates appellant's legal rights of their prior non-conforming use of their land to wit: excavating and selling sand and gravel taken from their property under water, and constitutes a taking without due process in violation of the 14th Amendment.

The 1956 judgment of the Supreme Court of the State of New York (Appendix, Exh. 3) adjudicated that appellants had a "prior non-conforming use in the conduct of a sand and gravel business" and the judgment provided that this business might be "carried on on the entire premises" of appellants—notwithstanding any ordinance of the plaintiff [appellee]". This legal right to continue a prior use which is in violation of zoning ordinances, has often been termed a "vested right" (*People* v. *Miller*, 304 N. Y. 105, 108).

The elimination of prior non-conforming uses which are considered objectionable by local communities, is a problem which has confronted communities throughout the United States and has been the subject matter of much judicial inquiry and review. The problem is reviewed extensively in *Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553 (1958), which cites much of the learning and decisions in New York and other states.

State and municipal legislation seeking to eliminate prior non-conforming uses has often been the result of "pressure groups" getting their views of civic planning adopted through local legislative bodies. (*Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553, 567.) We are not concerned, on this

appeal, with the social or economic factors involved in such legislation; nor do we dispute the salutary purpose expressed in the majority opinion of Judge Burke (R. 200) viz: "There must be progress" and sometimes "private interests * * * must yield to the good of the community". We are concerned, however, with the constitutional problem of payment for the taking of property occasioned by such legislation. The following statement of Mr. Justice Holmes in the *Pennsylvania Coal* case is applicable and pertinent to the *desideratum* stated by Judge Burke (R. 200) that "There must be progress":

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change" (260 U. S. at p. 416).

And Mr. Justice Holmes points out that the "constitutional way" is by the "exercise of eminent domain" (260 U. S. at p. 413).

In legislation enacted in states where the problem of eliminating non-conforming uses has been considered, provision has been made for amortizing the owner's investment and paying for the eliminated rights of prior use. See opinions in *Harbison* v. *City of Buffalo, supra.*

Ours is the only case we know of where a very substantial non-conforming prior use, established in litigation between the parties, has been eliminated—and thus far successfully —without any payment therefor. We know of no case where not only is the nonconforming use eliminated (section 4 (h)) but the ordinance requires (section 4(j)) the restoring of the property to its condition 30 years before—with criminal penalties provided for violations (section 10).

The learning on the subject is summarized in an article in 44 Cornell Law Quarterly 450 (1959) entitled "*Elimination of Nonconforming Use by 'Amortization'; Constitutionality of Municipal Ordinance*", in which the author concludes (p. 453): "The law is settled that retroactive zoning ordinances and ordinances requiring immediate cessation of prior nonconforming uses are unconstitutional because they are too harsh and unfair." See also: "*Amortization of Nonconforming Use Under Regulatory Guise*" (7 Syracuse Law Review 158).

In the case at bar, the trial court prohibited appellants from showing the total amount of their investment in their property and business (R. 119). Such evidence was admissible under the New York law established in *People* v. *Miller* (304 N. Y. 105, 108, 109) where the Court held that unless the loss to the owner of a prior non-conforming use is "slight and insubstantial" it cannot be constitutionally eliminated by ordinance. *Accord: Town of Somers* v. *Camarco*, 308 N. Y. 537, 539, 540 and *Harbison* v. *City of Buffalo, supra.* Fortunately, there is proof in the record in our case of the substantial nature of appellants' property, sufficient to demonstrate that appellants' business and investment are *not* "slight and insubstantial" and therefore constitute a taking, without compensation, in violation of the due process clause. Such evidence consists of the fact, first, that appellant Goldblatt is the admitted owner of 38 acres of real property located in Hempstead, Nassau County, often described by appellee itself as one of America's most prosperous and growing communities. Secondly, the judgment in the 1956 case (in which the same parties were involved) was marked in evidence in this case (exhibit "D"); and the transcript of the testimony in that case (exhibit "I"), shows that the gross annual business done by appellants was "in excess of $200,000 per year" and that capital investment of equipment and other property of

appellants used in their excavation operations was "approximately $241,000, excluding the value of the land itself".* Thirdly, although the trial court refused (R. 119) to permit appellants to develop fully the issue of investment and value of land and equipment, the court did permit testimony that the "assessed valuation" of appellants' "sand pit on the tax rolls of the County of Nassau" is $66,000 (R. 119); and assessed value in Nassau County represents only 35.88 per cent of true value (*Mid-Island Shopping Plaza* v. *Podeyn*, New York Law Journal, Aug. 12, 1960, Sup. Ct. N. Y., Nassau Co.).

Under the foregoing proof, showing very substantial investment by appellants in their prior nonconforming use, the judgment appealed from violates the well settled principle of constitutional law that a nonconforming prior use may not be eliminated without payment therefor. *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537; *Harbison* v. *City of Buffalo*, 4 N. Y. 2d 553. See also *Arverne Bay Constr. Co.* v. *Thatcher*, 278 N. Y. 222, 231 and *People* v. *Calvar Corp.*, 286 N. Y. 419, 421. The applicable rule of law was stated in *Town of Somers* v. *Camarco*, 308 N. Y. 537, 541:

> "Generally, nonconforming uses and structures are constitutionally protected and permitted to continue, notwithstanding the attempted contrary provisions of a new or amended zoning ordinance, unless the resulting loss to the owner is relatively slight and insubstantial. *People* v. *Miller*, 304 N. Y. 105."

Ordinance No. 16 makes no provision whatsoever for payment or amortization of appellants' valuable and sub-

* The finding made by Mr. Justice Hill in the 1956 litigation is that appellants "have made such a substantial investment in improvements in the business to warrant the continuance of [their] nonconforming use" (Appendix, exh. 2).

stantial rights of their prior nonconforming use—adjudicated in 1956. Moreover, it would appear that a statute providing for amortization of a business (cf. *Harbison* v. *Buffalo, supra*) would be inapplicable in our case because appellants cannot move their excavating business to a new site, as the owner of another type business can, such as the junk business in the *Harbison* case.

The foregoing distinction between a prior nonconforming use consisting of a business located on the property and the use of the real property itself, is pointed out in the decisions of *Hadacheck* v. *Los Angeles*, 239 U. S. 394, and *Terrace Park* v. *Errett*, 12 Fed. 2d 240, 243, cert. den. 273 U. S. 710.

In *Hadacheck*, this Court (239 U. S. at pp. 411 and 412) expressly stated the difference between a prohibition of the use of one's land (the situation in our case) and the prohibition of a business located on the land—which business could be physically moved to another location. The *Hadacheck* case involved a brick-making factory located on property containing clay used in the making of the bricks. This Court, noting (p. 410) that in *Ex parte Kelso* (147 Cal. 609) a statute prohibiting the maintenance of a rock quarry within the City of San Francisco was held unconstitutional (as a prohibition against the use of the real property itself) pointed out that the legislation attacked contained "no prohibition of the removal of brick clay" (p. 411) but only prohibited the manufacturing of brick. This Court posed the *quaere* (p. 412) whether a total prohibition of removal of the clay from the property would be a violation of the due process clause, as was held in *Ex parte Kelso.*

When the *quaere* raised in *Hadacheck* was later litigated in *Terrace Park* v. *Errett*, 12 Fed. 2d 240 (C. A. 6, 1926; cert. den. 273 U. S. 710) it was held that an ordinance which prohibited further excavation of sand and gravel from

one's property was unconstitutional. The Court in the *Errett* case, citing the *Hadacheck* case, said (p. 243):

> "There is also a substantial difference between an ordinance prohibiting manufacturing or commercial business in a residential district that may be conducted in another locality with equal profit and advantage, and an ordinance that wholly deprives the owner of land of its valuable mineral content. This difference was recognized by the Supreme Court in *Hadacheck* v. *Los Angeles,* 239 U. S. 394."

The opinion of Judge Burke was premised on "the presumption of constitutionality" (R. 199) arising from the regulatory provisions of Ordinance No. 16. We have thus far shown (1) that sections 4(h) and (j) are not regulations, but totally prohibit all underwater excavating on appellants' property and therefore the majority's reliance on a presumption of constitutionality of regulatory police power is erroneous; and (2) the ordinance—particularly 4(h) and (j)—violates the well settled principle of constitutional law that a nonconforming prior use cannot be constitutionally eliminated without provision for payment. The majority opinion found that Ordinance No. 16 does not "violate defendants' [appellants'] vested rights in an established nonconforming use" (R. 199) because it found the ordinance to be "merely" regulatory.

Although appellee's main theory of constitutionality of Ordinance No. 16 is alleged harm, evil or nuisance of appellants' excavation operations, the record contains no proof whatsoever to sustain any such theory. To the contrary, appellants' activities extending over a period of more than 30 years, have caused no injury to person or property and there was no proof of potential danger to person or property. Any presumption of constitutionality in the mere enactment of the ordinance has been overcome.

A basic contention of appellee, adopted in the majority opinion below, is that legislation must be sustained where "regulations" are "needed" to protect the community (R. 200). The majority opinion also says that "this record" demonstrates "a threat to the community's welfare" (R. 200). In addition to the fact that sections 4(h) and (j) are *not* regulatory, the fact is also that "this record" does *not* demonstrate any "threat to the community's welfare".

In *Town of Somers* v. *Camarco*, 308 N. Y. 537, the Court held that an ordinance prohibiting the continuance of a prior nonconforming use of excavating sand and gravel—the precise situation involved here—was unconstitutional as a taking without due process. By way of dictum the court noted that if the excavating operations constituted a "nuisance" then the situation might be different. The court said (p. 541):

> "We do not pass upon the question of what may be a proper exercise of the town's police powers so as to prevent the creation or maintenance of a nuisance on the premises of the defendants * * *."

In view of the fact that appellants have a legal, vested right to excavate under water on their property as a prior nonconforming use (which both the appellee and the majority opinion recognize) appellee argues "police powers"

in support of an affirmance of the judgment below. If the ordinance were regulatory and if it were shown that appellants' operations constituted a hazard, danger or nuisance, which required protection of police power legislation, then the validity of the ordinance might be shown. However (1) the 1958 ordinance is not regulatory and (2) there was no proof whatsoever that the conditions of operation of appellants' business were obnoxious or a nuisance to support the enactment of *prohibitory* legislation under the guise of police powers.

In connection with the observation made in the *Camarco* case, *supra,* viz: if the operations of a sand and gravel pit constitute a "nuisance", then legislation to "prevent the creation or maintenance of a nuisance" might be sustained, we note again the concession made by the appellee (R. 204) that it "does not contend" that appellants' excavating "amounts to a nuisance". The fact is that if appellants' operations constituted a nuisance or were hazardous, unhealthy or legally objectionable, the appellee-town could have sought an injunction in the 1956 litigation or in subsequent litigation to prevent appellants' operations; but appellee never brought any such action and in lieu thereof it amended Ordinance No. 16 which, by the stroke of a pen, accomplishes its purpose of terminating appellants' excavating business.

In addition to the concession made by appellee and noted in the opinion of Judge Van Voorhis (R. 204) that appellants' operations do not constitute a nuisance, the record in this case does not show any nuisance nor a single instance of any danger or hazard, present or potential, to person or property. There is not one instance of any injury to any person caused during appellants' 30 years of operations. There is not a single case of damage or danger to surrounding property. There was no proof of even one

trespasser on appellants' property completely surrounded by 7,000 feet of 6 foot wire mesh fence, topped by 3 strands of barbed wire. The banks and the slope of excavation are safe and there was never a single instance of a cave-in or the like or the threat of any cave-in.

Not only is the record free of any actual proof of danger, hazard or nuisance in appellants' operations, but there is no presumption that excavating sand and gravel constitutes a danger or nuisance, *per se*. To the contrary, the business of excavating sand and gravel is a highly important and legitimate industry.* The holding in *Somers* v. *Camarco*, 308 N. Y. 537, is a judicial recognition that excavating sand and gravel is a business protected by the law of prior nonconforming uses. Also the 1956 judgment (Appendix, exh. 3) recognizes the legitimate nature of this very underwater excavating by legally protecting it as a nonconforming use.

Although the appellee has never actually argued that sand and gravel excavating constitutes a danger or nuisance *per se*, and although appellee did not offer any proof whatsoever to show that appellants' operations constituted a dangerous or potentially dangerous operation, nevertheless in its briefs below appellee sought to create the im-

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*In 1956, Hon. Douglas McKay, the then Secretary of the Department of Interior of the United States, in an address made at the 40th annual conference of the National Sand and Gravel Association at Chicago, Illinois, on February 16, 1956, stated that the Association has "every reason to be proud of * * * the sand and gravel industry". He pointed out that for many years the sand and gravel industry was "second only to bituminous coal as the largest segment of mining industry in terms of production". Secretary McKay then went on to state that the new record of production of sand and gravel "elevated sand and gravel to first place in tonnage production of all minerals. The value of this output totaled almost a half billion dollars."

The 1959 statistics of the United States Bureau of Mines show that this business totaled more than $700,000,000 and more than $27,600,000 in New York alone.

pression that there is something malicious or obnoxious about sand and gravel excavating. For example, appellee has often referred to the excavation existing on appellants' property as a "huge sprawling crater". Likewise, appellee has consistently started its briefs with the unsupported statement that it is "common knowledge" that excavating sand and gravel is a dangerous enterprise. Appellee has also referred to "stagnant" water on appellants' property. This type of argumentation by epithet, and the use of scarehead terminology found its way into the opinion of the trial court which adopted some of the very language of appellee.* The fact is that it is *not* "common knowledge" that excavating sand and gravel is dangerous or hazardous *per se;* and in this case there is no proof to sustain this unfounded assumption, as we have seen.

Although appellee failed to prove that underwater or wet excavation is dangerous in this case, or dangerous *per se,* appellee's briefs have sought to create the impression that there is something bad or evil *per se* in the existence of the water located on appellants' premises. The unfounded assumption that a body of water is somehow inherently dangerous also finds its way into the majority opinion which recites that appellants' property "lies in the midst of a densely populated area".** The assumption

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* For example the trial court's statement (R. 183) that the artificial lake is "stagnant" comes from a statement found in appellee's trial brief and is not supported by the record. Since there is a continuous circulation of water caused by the very dredging operations (see exhs. 6G and 6P) and since the lake is fed by natural springs, the water is *not* "stagnant". The court also refers to the "huge sprawling crater filled with water" (R. 183).

** The objection to appellants' activities in this neighborhood was adjudicated against appellee in the 1956 litigation (Appendix, exhs. 2 and 3). As also noted by Judge Van Voorhis (R. 201): "Thus, defendants did not bring their business into a residential area; defendants' neighbors voluntarily came into this area where defendants' operations and the artificially created lake were evident and obvious."

that the mere existence of a body of water is dangerous is fallacious. Even when not surrounded by a fence, a body of water has been held to be *not* "inherently dangerous or a nuisance". See *Pope* v. *State*, 198 Misc. 31, 36, aff'd 277 App. Div. 1157; *Cunningham* v. *City of Niagara Falls*, 242 App. Div. 39, aff'd 269 N. Y. 644.

The recital in the majority opinion (R. 199): "Included within a radius of 3,500 feet are more than 2,200 homes and 4 schools with an enrollment of 4,500 children", is of no significance in support of the 1958 ordinance as a valid exercise of police powers. These statistics constitute no proof of "danger to the public" (*Panhandle* v. *State Highway*, 294 U. S. 613, 619) nor do they prove any need for abolishing all underwater excavating and filling the excavation (section 4(j)): Bodies of water, both natural and artificially created, exist throughout the United States, in populated and in rural communities. There exists in Central Park in New York City, a body of water, unfenced, and surrounded by thousands of homes, hundreds of schools and millions of children. In our case there was no proof of a single instance where the water on appellants' land caused injury or harm to a single child and there was no proof that this water constitutes a potential danger to the children living in the neighborhood. We have before noted that the water, as well as appellants' entire property, is completely fenced, the fencing is continually inspected and maintained, and there was no evidence of a single trespasser.

Drownings, of course, occur in lakes and bodies of water, both guarded and unguarded and both natural and artificially created. Yet that fact would not be justification for sustaining the requirement (section 4(j)) that the artificial lake here (covering 20 acres) be filled, any more than a

statute prohibiting automobiles would be sustained for the reason "that children as well as adults are occasionally injured or killed by them" (opinion of Van Voorhis, *J.*, R. 206).

In place of proof, the trial court and the majority opinion below repeatedly refer to "common knowledge" that there is danger *per se* in excavating sand and gravel and that water is dangerous, *per se*. The fact is that there is no such "common knowledge". The majority opinion (R. 200) says:

> "The hazards to both life and property accompanying the *uncontrolled* operation of these pits are common knowledge and this restraint need not await an event." (Emphasis added.)

No one will dispute the foregoing statement that excavating should not be an "uncontrolled operation".* However the statement does not support the legality of sections 4(h) and (j) of the 1958 ordinance which does not *control*, but *prohibits* all underwater excavating and puts appellants out of business.

Although appellee has argued that the 1958 ordinance is not a taking because it does not cause a prohibition of appellants' underwater excavating, appellee has also argued (p. 11 of its motion to dismiss made in this Court) that even if the ordinance results in a termination and prohibition of appellants' business by depriving appellants of their "only profitable use" (i.e. excavating) the ordinance is nevertheless constitutional, citing *Reinman* v. *Little Rock*, 237 U. S. 171; *Hadacheck* v. *Sebastian*, 239 U. S. 394; and *Pierce Oil* v. *City of Hope*, 248 U. S. 498. These cases (de-

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* Appellants' excavating is *not* an "uncontrolled operation". The property is fenced, supervised and maintained.

scribed as "extreme cases" by Mr. Justice Douglas in the *Saxl* case, 328 U. S. 80, 83) involved activities which were found, on demurrer, to be noxious, offensive and "productive of disease" (Mr. Justice Pitney in *Reinman* v. *Little Rock*, 237 U. S. at p. 178).

In the instant case, there is absolutely no proof whatsoever that appellants' operations are noxious, offensive, dangerous, a nuisance, or productive of disease.

Furthermore, the opinions in the *Reinman*, *Hadechek* and *Pierce Oil* cases point out that the noxious business could be physically moved elsewhere; and in the *Hadachek* case it was specifically pointed out that this Court was not prohibiting the taking of the clay out of the ground, but only the making of the brick from the clay. See our discussion of *Hadacheck*, *supra*, p. 23.

The *Reinman*, *Hadachek* and *Pierce Oil* cases were decided on motion or demurrer. In the *Reinman* case, the plaintiff demurred to the answer of the City of Little Rock which, in the words of Mr. Justice Pitney, had alleged that plaintiff's "stables are conducted in a careless manner, with offensive odors, and so as to be productive of disease." Mr. Justice Pitney then said (p. 178):

> "Plaintiffs did not contradict this but demurred to the answer as insufficient in law and the case was heard in the trial court upon * * * the demurrer."

Likewise, the *Pierce Oil* case was decided on demurrer on pleadings which alleged that the storage of gasoline 300 feet away from dwellings was dangerous. Neither the *Reinman* nor the *Hadachek* nor the *Pierce Oil* cases are cited in Mr. Justice Holmes' opinion in *Pennsylvania Coal Co.* v. *Mahon*. The fact that Mr. Justice Holmes also wrote the opinion in the *Pierce Oil* case is significant.

Furthermore, in none of these "extreme cases" (Douglas, *J.* in 328 U. S. at p. 83) was there any affirmative requirement that not only should the business be enjoined but that the owner make an expenditure of approximately $1,000,000 (required in our case) to restore the business or premises to their original condition. We know of no case which makes any such affirmative requirement. Moreover, in none of these "extreme cases" had there been a previous adjudication, such as we have here (Appendix, exhs. 2 and 3) that the business involved was actually a legitimate and proper business; nor was there a judicial finding such as was made in the 1956 litigation that appellants were "entitled * * * to continue their operations, *in futuro*, as to the entire premises" (Appendix, exh. 2). To the contrary, the business was enjoined in each of the cases cited by appellee because of the finding that it *was* a danger or a nuisance in the community.

Additionally, there remains serious doubt whether the appellee-town has the legal power and authority to enact a *prohibitory* ordinance, such as we have here. Ordinance No. 16 recites (R. 6) that it is enacted "pursuant to the provisions of Section 130 of the Town Law of the State of New York", which delegates the power to the appellee-town only to "*regulate*", not prohibit, "excavations and sand pits". Section 130, subd. 23 of the Town Law authorizes only the enactment of ordinances "*regulating* the * * * removal of materials from, filling up, draining, cleaning, operating and using any lands or other premises for sand and gravel pits * * * and prohibiting the use of any lands or other premises * * * which do not comply with such *regulations*". (Emphasis added.)

The argument of appellee itself, made in the Court of Appeals, that appellants might use the water on their premises for boating and swimming by children—after

the termination of appellants' excavating activities—is directly contrary to the theory also advocated by appellee that water is dangerous *per se*.

We have seen that the majority opinion below relies on the presumption of constitutionality. The 1958 amendment to Ordinance No. 16 recites (R. 6) that the amendment prohibiting all dredging under water and requiring the refilling of the excavation was purportedly enacted "to remove the danger to health and life caused by deep excavations remaining in the ground". This recital, made by the appellee-town after it lost its 1956 litigation which sought to shut down appellants' business, was overcome by the proof in this case that there was no danger.

The facts in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, were much stronger in support of the exercise of police power than in the case on appeal. In that case a Pennsylvania statute prohibited coal mining under dwellings and public places. The legislation was upheld as a proper exercise of police powers by the highest court of Pennsylvania which pointed out (274 Pa. 489) that the legislation was enacted on the findings of the Pennsylvania legislature and the governor who signed the bill that "lives have been lost, homes, churches and schools destroyed and an ever present peril has threatened the morale of the entire community." The Pennsylvania Court further stated that mining under dwellings, which was prohibited by the legislation, had been declared by the legislature "to be a public nuisance."

This Court reversed the Pennsylvania Court, holding that the statute was unconstitutional as applied to a coal company which had sold to the defendants the land and house on its property but had reserved the right to mine and remove coal. This Court held that the legislation was not

a valid exercise of police powers despite the legislative recitals and despite the finding of the trial court that the proposed mining of coal "would cause damage" to defendants' homes and despite the recognition in this Court's opinion (p. 416) that such mining would constitute a "danger" to defendants' property. This Court concluded that the prohibition of mining was a taking in violation of the due process clause of the 14th amendment and specifically stated that the recitals in the legislative proceedings of danger was insufficient to sustain the constitutionality of the legislation. And this Court further stated that if the State wished to eliminate the purported nuisance, the constitutional method was "eminent domain and compensation to sustain the act" (260 U. S. at p. 413).

The 1958 amendment to Ordinance No. 16 certainly demonstrates a strong desire of the appellee to get rid of the excavating business of appellants which had legally been conducted for over 30 years. We must repeat the answer to such desire, given by Mr. Justice Holmes in the *Pennsylvania Coal* case (260 U. S. at p. 416):

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Recently it was reported (New York Herald Tribune, July 18, 1961) that Nassau County has begun "condemnation proceedings to acquire land for a 275 acre county park and golf course" which was previously used for excavation of sand and gravel. The property is reported to belong to the Colonial Sand and Stone Company, Inc. This constitutional method of condemning a sand pit in the same county where appellants' property is located, should

be used if the appellee-Town desires to eliminate appellants' excavating business. As we noted above, there were actual discussions between the Town and appellants concerning the condemnation of appellants' property, but negotiations were terminated when the Town decided to rely on the presumption of constitutionality of legislation as a basis for the 1958 amendment.

The 1958 Amendment to Ordinance No. 16 was aimed directly at appellants' property and activities and was enacted for the special and particular purpose of eliminating appellants' excavating business which had been previously carried on lawfully and continuously for over 30 years.

Inasmuch as appellants' excavating business, and particularly its excavating by the hydraulic method under water, was admittedly the only operating sand and gravel operation in the Town of Hempstead at the time the 1958 amendment was enacted, the statement of Judge Van Voorhis (R. 204) that the 1958 amendments were "directed at this single operation and designed to accomplish what the 1956 lawsuit had failed to do, viz: to destroy a lawfully preexisting use under the Town Zoning Ordinance" is fully justified.

If the judgment below is affirmed, not only will appellants forever be barred from future excavation operations, but the requirement (Section 4(j)) of refilling the excavation, from which 1,000,000 cubic yards of fill have admittedly been removed, is so onerous and costly that appellants could not afford to do the refilling (estimated at $1,000,000)* and pay the taxes on the property. Hence,

* There was testimony that 1,000,000 cubic yards of fill would be required to restore the property to its 1928 condition (R. 63). The estimate of $1,000,000 is based on the current price of $1 per cubic yard for "clean" fill required by section 4(j).

appellee-Town will end up by owning the property, without paying anything therefor.

To the extent that appellants "now conduct the only sand and gravel business by dredging in Hempstead * * * it would appear that the ordinance was aimed directly at them" (Van Voorhis, *J.*); and since there is no showing that the excavation activities now are different from, or more dangerous than the operations conducted over the 32 year period (1927 to 1959), the holding in *Dobbins* v. *Los Angeles,* 195 U. S. 223, is pertinent. In the *Dobbins* case, property was purchased by the plaintiff in September for the purpose of erecting a gasworks on the property which was within an area in which a gasworks was permitted. Two months later, the City enacted an ordinance prohibiting the erection of a gasworks within that area. This Court pointed out (p. 239) that there was no showing that there had been any change in "conditions" involving the erection of the gasworks between the time of the purchase of the property (September) and the enactment of the ordinance (November); and held that the ordinance was directed against plaintiff's business and property. The Court said (pp. 235, 236) that although "every intendment is to be made in favor of the lawfulness of the exercise of municipal power making legislations to promote the public health and safety" nevertheless the ordinance could not be sustained as a proper exercise of police powers because there was no showing that the public health or welfare required the ordinance (p. 239). The legislation directed at plaintiff's property was held invalid as a "taking of property without due process of law" (p. 241).

POINT II

The 1956 judgment directly adjudicated, in an action between the same parties to this litigation, that appellants have the legal right to continue their underwater excavating business on their entire premises. The 1958 Amendment to Ordinance No. 16 which directly prohibits what the 1956 judgment permits, is unconstitutional to the extent that such legislation overrules vested rights obtained by the 1956 judgment.

The decision in the 1956 litigation between the parties,* and the judgment entered thereon (Appendix, exhs. 2 and 3), expressly provide that appellants have the legal right to continue their prior non-conforming use in the conduct of their sand and gravel business "which may be carried on on the entire premises * * * notwithstanding any ordinances of the plaintiff [appellee]".

At the time of the 1956 litigation, in which appellee sought to enjoin appellants' excavating business, Ordinance No. 16 was in effect. Until it was amended in 1958, the ordinance was *regulatory*, providing for the fencing of the property, the degree of slope, the width of berms, etc. Appellants have never and do not now challenge the fact that their business is subject to reasonable regulations; and appellants complied with all of the *regulatory* provisions of Ordinance No. 16 enacted in 1945. In the 1956 litigation the Town never raised the issue of whether appellants were violating Ordinance No. 16, nor did they claim that underwater dredging by appellants constituted

* The parties in both cases are the same. The defendant East Meadow Realty Corp. (all of whose stock was owned by appellant Goldblatt) in the 1956 lawsuit (Appendix, exh. 3) was the prior record owner of the land, title to which is now in appellant Goldblatt.

a danger or nuisance. These latter issues could have been tried in the 1956 litigation, but appellee chose not to do so.

Appellee did not appeal the 1956 judgment but accomplished the same purpose as a reversal on appeal by enacting the 1958 amendments which expressly provided that appellants could no longer do exactly what the 1956 judgment said they could do, to wit: excavate under water.

In answer to this point II of appellants, appellee has argued that no constitutional issue of due process is involved because the 1956 litigation involved only the Town's zoning ordinance whereas this appeal involves the exercise of police powers in the enactment of the 1958 ordinance changes. This argument proceeds on the mistaken theory that there is a dichotomy between cases involving zoning ordinances and other cases involving police power. The argument loses sight of the fact that zoning regulations are also based on the proper exercise of police power. *Village of Euclid* v. *Ambler Realty*, 272 U. S. 365.

If there had been a change in operations between the time of the 1956 judgment and the 1958 amendment of Ordinance 16 and if such change brought about a condition of nuisance or hazard to the community then the argument might be pressed that such new circumstances made the 1956 judgment no longer effective to give appellants' rights specifically acquired therein i.e. the right of excavating on 20 acres under water. But there were no new or different conditions in appellants' excavation operations between 1956 and 1958.

Certainly the record does not support any basis for concluding that the appellee-Town, which had lost its 1956 lawsuit, could constitutionally call on police powers to reach a decision contrary to the 1956 judgment. Judge Van Voorhis has described the situation accurately (R. 204):

> "• • • an examination of the clauses in the 1958 amendments to Ordinance No. 16 supports the contention that it was • • • designed to accomplish what the 1956 lawsuit failed to do, viz., to destroy a lawful pre-existing use under the Town Zoning Ordinance. The object [of the 1958 amendment] is not to promote public health or safety, but to end the operation of this business under the guise of regulation."

To the extent that the 1958 ordinance directly overrules and does away with vested rights which appellants obtained in the 1956 judgment, the ordinance violates the due process clause of the 14th Amendment. The applicable law is stated in *McCullough* v. *Virginia*, 172 U. S. 102, 123:

> "It is not within the power of a legislature to take away rights which have once been vested by a judgment."

In *Massingill* v. *Downs*, 48 U. S. 760, 767, this Court said:

> "No legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment."

See also *Germania Savings Bank* v. *Suspension Bridge*, 159 N. Y. 362, 367, 368; *Waddey* v. *Waddey*, 290 N. Y. 251; and *Hoyt Metal* v. *Atwood*, 289 Fed. 453, 454, 455 (C. A. 7, 1923).

POINT III

To the extent that Sections 4(h) and 4(j) of the 1958 Ordinance impose civil and property penalties on the appellants in requiring them to stop all business operations and to refill an excavation covering 20 acres which was legally made over a 30 year period; and to the extent that the Ordinance also provides that failure to comply with these Sections of the Ordinance subject appellants to serious criminal penalties of fine and imprisonment (Section 10 of the Ordinance), the Ordinance constitutes *ex post facto* legislation and is a bill of attainder in violation of Article I, Section 10, Clause 1 of the United States Constitution.

Article I, Section 10, Clause 1 of the United States Constitution provides:

> "No state shall * * * pass any * * * Bill of Attainder, *ex post facto* Law, * * *"

Section 10 of the 1958 amendment of Ordinance 16 (R. 8) provides for fine up to $500 and imprisonment not exceeding 6 months for each violation and further provides that "each week's continued violation shall constitute a separate additional violation".

The minority opinion below finds the 1958 ordinance unconstitutional, not only in violating the due process clause of the 14th Amendment, but also because it violates the constitutional provision against *ex post facto* legislation.* Judge Van Voorhis wrote (R. 203):

> "While in a proper case the distinction is a valid one, the record here indicates a systematic attempt to

---

* The majority opinion does not consider the issue of *ex post facto* legislation.

force the defendants out of business. The decision below has that practical effect. A condition of continuing the business requires defendants to fill the existing excavation at a cost in excess of $1,000,000. If this is not done, the ordinance purports to render defendants criminally liable for separate misdemeanors during each week until the pit is refilled. This particular portion of the ordinance, we may note, in addition to other objectionable features, serves, in effect, to render criminal an act innocent when done (*People* v. *Oliver*, 1 N. Y. 2d 152, 158). In consequence, it may well be regarded as oppressive, and condemned by the constitutional prohibition against *ex post facto* laws (U. S. Const., art. I., § 10). In other words, under the challenged ordinance as it now stands, defendants are susceptible of criminal prosecution for not filling in the excavation (to the extent of approximately 1,000,000 cubic yards) lawfully created over the years prior to enactment of the ordinance, by means of the lawful removal of sand, and in the course of prosecuting a lawful business."

The undisputed facts are: (1) the excavation and creation of the artificial lake, was done legally and openly (2) the artificial lake was created as early as 1928 and (3) the excavation work received the judicial sanction of the Supreme Court of New York in the 1956 litigation. From the foregoing it would seem to follow that (1) the 1958 enactment of criminal punishment (fine and imprisonment) for the doing of those acts (viz: digging and creating a lake), which were legal when performed (2) as well as the non-criminal penalty of putting appellants out of business (sections 4(h) and (j)) constitute *ex post facto* legislation.

The trial court held—erroneously, in our opinion—that the defense of *ex post facto* legislation was not available, stating (R. 182):

"Obviously, such a defense has no place in this civil trial; that doctrine applies only to criminal cases (citing cases)."

As far back as 1878, this Court (*Burgess* v. *Salmon*, 97 U. S. 381) held that a statute may violate the prohibition against *ex post facto* legislation, where only civil sanctions of the statute were involved.

The statute in the *Burgess* case provided for both criminal (fine and imprisonment) penalties as well as civil sanctions. The issue was thus stated by this Court (97 U. S. at p. 382):

"The case presents but a single point: can a manufacturer be punished, criminally and civilly,—*civilly* here,—for the violation of a statute, when the statute was not in force at the time the act was done? (Emphasis added.)

The holding of the Court was as follows (p. 384):

"To impose upon the owner of the goods • • • a penalty of $377, for not paying an additional tax of four cents a pound, would subject him to the operation of an *ex post facto* law.

"An *ex post facto* law is one which imposes a punishment for an act, which was not punishable at the time it was committed, or a punishment in addition to that then prescribed. *Carpenter* v. *Commonwealth of Pa.*, 17 How. 456.

"Had the proceeding against Salmon & Hancock been taken by indictment instead of suit for the excess of the tax, and the one was equally authorized with the other, the proceeding would certainly have fallen within the description of an *ex post facto* law."

See also: *Cummings* v. *Missouri*, 4 Wall. (71 U. S.) 277 and *Ex parte Garland*, 4 Wall. (71 U. S.) 333.

Recent decisions of this Court demonstrate that the prohibition against bills of attainder is *not* limited to punishment consisting of the classic criminal sanctions of fine and imprisonment but also includes punishment involving forfeiture or loss of civil and property rights. *Flemming* v. *Nestor*, 363 U. S. 603; *United States* v. *Lovett*, 328 U. S. 303; *DeVeau* v. *Braisted*, 363 U. S. 144; *Trop* v. *Dulles*, 356 U. S. 86.

The *Flemming* case involved Article I, Section 9 of the Constitution which prohibits Congress from enacting *ex post facto* laws and bills of attainder. Although the majority opinion (in which 5 judges concurred) held that the statute depriving a deportee of social security benefits was not unconstitutional, there appeared to be no difference in the majority and dissenting opinions in the view that the prohibition against bills of attainder and *ex post facto* laws includes legislation which deprives one of property rights. The difference in the majority and minority opinions in that case was based on the issue whether the particular legislation was "aimed at the person or class of persons disqualified" (p. 614) or, on the other hand, whether the legislation merely regulated "activity or status from which the individual is barred". The majority opinion written by Judge Harlan held the legislation was not "aimed" at the appellee and therefore held the statute not *ex post facto* legislation or a bill of attainder.

In our case, the 1958 amendment was certainly "aimed directly at [appellants]" who "conduct the only sand and gravel business by dredging in Hempstead" (Van Voorhis, J. at R. 202). Accordingly, it would appear that under both the majority and minority opinions in the *Flemming* case, the civil penalties in our case (sections 4(h) and (j))

of Ordinance 16—let alone the criminal sanctions (section 10)—constitute *ex post facto* legislation and a bill of attainder.

Mr. Justice Douglas, reviewing prior holdings of this Court, stated the following which applies to our case (363 U. S. at pp. 629, 630):

> "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. *Cummings* v. *Missouri*, 4 Wall. 277, 323.
>
> • • • • •
>
> "Punishment in the sense of a bill of attainder includes the 'deprivation or suspension of political or civil rights.' *Cummings* v. *Missouri, supra,* at 322. In that case it was barring a priest from practicing his profession. In *Ex parte Garland,* 4 Wall. 333, it was excluding a man from practicing law in the federal courts. In *United States* v. *Lovett,* 328 U. S. 303, it was cutting off employees' compensation and barring them permanently from government service. *Cutting off a person's livelihood by denying him accrued social benefits—part of his property interests—is no less a punishment.* Here as in the other cases cited, the penalty exacted has one of the classic purposes of punishment—'to reprimand the wrongdoer, to deter others.' *Trop* v. *Dulles,* 356 U. S. 86, 96." (Emphasis ours.)

In our case on appeal, the non-criminal provisions of Ordinance No. 16, to wit: Sections 4(h) and 4(j), provide punishment of appellants for doing acts which were legal when done and constitute legislation which inflicts the punishment of totally depriving appellants of their property and business of excavating.

In the *Lovett* case, 328 U. S. 303, 315, the Court, after reviewing *Cummings* v. *Missouri*, 44 Wall. 277 and *Ex parte Garland*, 4 Wall. 333, said the following (p. 315):

> "Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, *no matter what their form*, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (Emphasis added.)

To the extent that the 1958 amendment provides punishment for acts previously done which were legal when done, it violates the prohibition against *ex post facto* legislation; and to the extent that it provides punishment consisting of the taking away of appellants' business and property "by legislative fiat" (Douglas, *J.* in *Flemming* v. *Nestor*) it constitutes a bill of attainder.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

MILTON I. NEWMAN
Counsel for Appellants

EMIL N. BAAR
JOHN J. BENNETT
EDWARD M. MILLER
of Counsel

APPENDIX

EXHIBIT 1

Pertinent Provisions of Ordinance 16

Section 4(h) of Ordinance No. 16, as amended on November 25, 1958, provides:

> No excavation shall be made below two feet above the maximum ground water level at the site.

Section 4(j) provides:

> When earth has been removed from any part of any pit excavation area to the maximum extent allowable under this ordinance or the removal of earth from any such part has been discontinued or abandoned or the permit for such removal has expired, such pit or part thereof shall be immediately refilled with clean, nonburnable fill containing no garbage, refuse, offal or any other deleterious or unwholesome matter and the premises, after completion of the removal of earth from the entire pit excavation area shall be so filled and graded to the levels of the nearest abutting streets or roads.

Section 10 provides:

> Penalties. For any and every violation of the provisions of this Ordinance, the owner, general agent, or contractor of a building on premises where such violations have been committed or shall exist, and the lessee or tenant of any part of the premises in which part of said violation has been committed or shall exist, and the general agent, architect, engineer, surveyor, building contractor or any other person who knows, permits,

takes part or assists in any such violation, or who maintains any premises in which any such violation shall exist, shall be guilty of a misdemeanor, which shall be punishable by a fine of not more than $500.00 or imprisonment for a period not exceeding 6 months for each such offense, or by both such fine and imprisonment. Each week's continued violation shall constitute a separate additional violation.

EXHIBIT 2

Opinion in Prior Litigation

Dated March 8, 1956

TOWN OF HEMPSTEAD,

—v.—

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.

By this action plaintiff, Town of Hempstead, seeks an injunction restraining defendant from the operation of a sand and gravel business on premises described in the complaint as a violation of the town zoning ordinance. Defendants' counterclaim for a determination that the ordinance is invalid insofar as it restrains them from the operation of a sand and gravel business on the premises.

Defendants or their predecessors have owned and conducted a sand and gravel business on the 38 acre parcel described in the complaint since 1927. The first zoning ordinance of the town was adopted in 1930. I find that the defendants are now and have been since 1927 conducting a prior non-conforming use on the premises, and that they have made such a substantial investment in improvements in the business to warrant the continuance of this non-conforming use, see *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537.

I, further, find that there has been a substantial use of the entire premises to entitle defendants to continue their operations, *in futuro*, as to the entire premises.

The complaint is dismissed and the counterclaim granted insofar as it seeks a determination that the prior nonconforming use can be carried on on the entire premises with costs to defendants.

The foregoing constitutes the decision of the court pursuant to the provisions of the Civil Practice Act.

Settle Judgment.

HILL
J.S.C.

EXHIBIT 3

Judgment in Prior Litigation

At a Special Term, Part I thereof, of the Supreme Court of the State of New York, held in and for the County of Nassau, at the Nassau County Courthouse, Old Country Road, Mineola, New York, on the 5th day of April, 1956.

Present:

HON. L. BARRON HILL,

Justice.

7006/54

TOWN OF HEMPSTEAD,

Plaintiff,

—against—

EAST MEADOW REALTY CORP. and BUILDERS SAND AND GRAVEL CORP.,

Defendants.

The issues in this action having duly come on to be heard before this Court at a Special Term, Part I thereof, held at the Nassau County Courthouse, Mineola, New York, on the 14th and 15th days of February, 1956, and the plaintiff having appeared by John A. Morhous, Esq., by Edward M. Kolbell, Esq., of counsel, and the defendants having appeared by Edward M. Miller, Esq., and the allegations and proofs of the respective parties having been duly heard and considered, and the Court having made its decision

in writing, dated March 9, 1956, and having in its aforesaid decision directed the dismissal of the complaint and having granted judgment to the defendants on the counterclaim insofar as it sought a determination on the non-conforming use, with costs to the defendants, and the costs and disbursements of the defendants being the sum of $78.38, as taxed by the County Clerk of the County of Nassau, and on motion of Edward M. Miller, attorney for the defendants, it is

ORDERED, ADJUDGED AND DECREED, that the complaint herein be and the same hereby is dismissed; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants have a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises described in the complaint, notwithstanding any Ordinances of the plaintiff; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants, of Newbridge Avenue, East Meadow, New York, recover of the plaintiff, of Town Hall, Front Street, Hempstead, New York, the sum of $78.38, costs and disbursements, as taxed, and that the defendants have execution therefor.

Judgment this 5 day of April, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, *et al.*,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF APPELLEE

RICHARD P. CHARLES,
Special Counsel to John A. Morhous,
Attorney for Appellee,
Town of Hempstead.

Of Counsel:
RICHARD P. CHARLES,
WILLIAM C. MATTISON,
MARIO MATTHEW CUOMO.

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IN THE

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OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, *et al.*,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF OF APPELLEE

Statement

This case involves an ordinance of the Town of Hempstead on Long Island in New York State and the application of that ordinance to appellants' sand and gravel pit. That pit is now a sprawling 20-acre crater containing a man-made lake formed by the mining operation. It lies in a 38-acre tract owned by appellant, Herbert W. Goldblatt, and devoted to sand and gravel mining by appellant Builders Sand and Gravel Corp.

Ordinance No. 16 was adopted by the Town of Hempstead in 1945 when all the Towns of Nassau County in New York adopted similar ordinances to curtail—in the language of Ordinance No. 16—"the danger to health and life caused by deep excavations remaining in the ground"

(Pltf's. Ex. 1; R. 22; pp. 6-9 of R.). Before the enactment of the 1945 ordinance the courts in a number of reported cases had freely noted the peril that lurks in these pits and the lives that had been lost in them. Pits like the one here in question had been held to be "nuisances". (See e.g., *Post Brick Co., Inc.* v. *Thompson*, 68 N.Y.S. 2d 159, 161 (Sup. Ct., Nassau Co.) (not officially reported); *People* v. *Gerus*, 69 N.Y.S. 2d 283, 291 (Co. Ct., Nassau Co.) (not officially reported).) The danger has continued to attract the attention of the courts in more recent years. (See e.g. *Town of Huntington* v. *Broad Hollow Estates, Inc.*, 138 N.Y.L.J. # 55, Sept. 17, 1957, pages 11-12 (Sup. Ct., Nassau Co.), aff'd without opinion 172 N.Y.S. 2d 543 (not otherwise reported).)

Ordinance No. 16 is not a zoning ordinance; it does not prohibit sandpits or even excavations. Sandpits may operate under its provisions but that use is controlled by certain minimal safety regulations. The ordinance prescribes, among other things, setback requirements, degree of bank slope, fence and retaining wall provisions. These provisions, as the Trial Court noted in its opinion "are clearly suited for the curtailment of obvious dangers" (R. 183); they operate to prevent cave-ins, falls and unsettling of properties neighboring on sandpits. By virtue of an amendment, the ordinance provides that no pit excavation may penetrate the water table at the site. This provision was designed to eliminate the danger of children drowning in huge artificial lakes like the one here involved. The provision was inspired by the commonly known appalling statistics of children's drownings in such pits. It was also intended to protect against possible pollution of the local water supply, a problem which has grown steadily in the past several years.

By this action the appellee Town sought to apply its duly adopted regulatory ordinance to appellants' huge excava-

tion. The Town proved at the trial each specification of its complaint. It was established that this sandpit occupies slightly more than half the area of the 38-acre tract owned and operated by appellants. Plaintiff's Exhibit 2 at the trial, a large aerial photograph, is a picture of the pit and the surrounding residential area (R. 24). The pit itself is filled with water to an average depth of about 25 feet. In some places the water is as deep as 48 feet (Pltf's. Ex. 3, R. 36). The formation of this lake has resulted from excavation by appellants beyond the maximum level now permitted by Ordinance No. 16 (R. 49-54). Although a small body of water was first formed by appellants' excavations some 30 years ago, this water-filled crater became progressively larger and deeper with the continuance of the operation until finally it formed the present 20 acre lake.

The pit lies in the midst of a densely populated area where children and schools abound. There are approximately 2,200 homes within a 3,000 feet radius of the center of the sandpit with an estimated population of 8,800 people (Pltf's. Ex. 2, R. 24). Four public schools are located within a radius of 3,500 feet; their enrollment is about 4,500 children. Within 1,500 feet there is situate a church where each day about 700 students (or each week about 3,500 students) receive religious instruction (R. 24; 27-35).

There is no dispute over the fact that the pit flagrantly violates a number of the ordinance's more substantial proscriptions: (a) in many places the excavation commences within 20 feet of the adjoining property line; (b) in certain places the pit excavation is more than 10 feet below the established grade of the nearest public street, and the incline of the sidewalls is more than 2 horizontal feet to 1 vertical foot without the support of retaining walls; (c) there is no concrete curb beneath the fence which encloses the premises and (d) appellants' excava-

tion goes far beyond the maximum depths allowed by the ordinance, thus penetrating the water table creating the described huge, artificial lake (R. 35-41; Pltf's. Ex. 3, R. 36; Pltf's. Ex. 4; R. 36; R. 41-44).

The tack taken by appellants on the trial should be noted here. At that time appellants were not represented by the attorneys who now make their appeal. With the change of attorneys there has been a marked change in legal argument. At the trial, appellants conceded their violation of the ordinance and devoted almost their entire case to the thesis that this ordinance and its enforcement were unjustifiably discriminatory and violative of the equal protection clause. Eleven separate examinations before trial, all directed to the attempt to make out that defense, were conducted, and the great bulk of the testimony offered on the trial was to the same end. The balance of appellants' testimony was offered to prove that another judgment in an action brought under an entirely different ordinance was *res judicata*. Little, if any, of the testimony offered was designed to put in issue the reasonableness of the ordinance's provisions or their fitness to serve the salutary purposes for which they were intended. Nor was any real attempt made to [illegible] any of the factual hypotheses which underlie their principal argument of confiscation.

In a lengthy and comprehensive opinion (R. 177-188) the Trial Court considered and specifically rejected each of the arguments made by appellants. With regard to the confiscation argument, which in the metamorphosis that has ensued since the entry of appellants' latest counsel is now the appellants' principal contention, the Trial Court pointed out that there had been a total failure of proof on all of the essential ingredients of that argument (R. 183). The Trial Court pointed out that the burden of proof and the burden of coming forth with evidence lay with appellants. It was not for the Town to prove justification for

its ordinance in the first instance; that was presumed. The law placed the burden of the attack upon the appellants and they had failed totally to satisfy that burden (R. 182). This factual disposition was unanimously affirmed by the Appellate Division of the Supreme Court (R. 193-195) and affirmed again by the Court of Appeals in the order from which this appeal is taken (R. 207-209).

Appellants' present counsel entered the case upon the appeal in the Court of Appeals. For the most part, their legal argument in that court was based on traditional constitutional generalizations that simply had no application to the case as it appears in this record. Unable to find an argument to fit the case, counsel instead decided to attempt to make the case fit the argument and proceeded in its brief to interpolate into the record a series of major factual premises. The dissenting judges in the Court of Appeals were content to accept the version of the record proof given in appellants' brief—indeed this is apparent from the dissenting opinion—and upon that newly spun version of the facts rendered an opinion that declared the subject ordinance unconstitutional. The majority of the Court of Appeals limited itself to the record before the Court and was led to the conclusion that the ordinance was constitutional. Because appellants rely so heavily upon the dissenting opinion below, the factual and conceptual inaccuracies and errors that led to that opinion (which also form the substructure of appellants' arguments in this Court) are set out now at the outset of this brief.

Analysis of Appellants' Statement of the Record

Throughout the argument in the Court of Appeals and now in this Court appellants have repeatedly asserted that there was no nuisance, no existing evil and no danger at their pit. They couple this misstatement with the decep-

tive one that the respondent Town failed to prove their operation a nuisance or a hazard.

This latter statement is deceptive because by plain implication it would put upon the respondent Town a burden of proof it simply did not have. Later in this brief appellee refers to some of the familiar cases which point out that the law presumes in the first instance the reasonableness of the ordinance and the existence of the evil sought to be corrected. The burden is then upon the assailant to establish that the ordinance is unreasonable. As the Trial Court specifically found, and as all the appellate courts below have held, appellants simply failed to adduce the proof necessary to bear their burden. Additionally, this statement is deceptive because it ignores the unquestionable public experience, the available public records and the common knowledge to which the courts in the opinions cited earlier in this brief made ready reference. There is no question about the propriety of considering these factors in judging this ordinance (See e.g. *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498).

In both the Appellate Division and the Court of Appeals below appellants stated flatly that there had been no loss of life or property at the pit. This fact, even if true, would not of course have been a determinative one and the Trial Court so held (R. 183). But the offensive aspect of the statement was that it was unsupported by the record and indeed contrary to actual fact. Appellee had obtained from the Nassau County Police Department the statistics of drownings in pits like the subject one but because of the total failure of proof by appellants on the trial decided that it was unnecessary to offer them. It was not until appellants repeated their misstatement in the Court of Appeals that appellee felt obliged to request the Court to take judicial notice of the statistics and in particular of the drowning of a child in the very pit in question in 1944 (See R. 206). It does not affirmatively appear that the majority

took note of this particular event and, of course, whether it did or did not is inconsequential since—concededly—the occurrence of one single event in the pit in question would not necessarily be decisive. But the drowning incident was introduced in order to point up the lengths to which appellants have gone in an attempt to supply for their legal contentions the factual bases which are so evidently lacking in the actual record.

Another of the principal props of appellants' contentions in this Court is the asserted fact that the judgment below, in effect, totally and absolutely prohibits appellants' operations and leaves their land valueless. The proposition is completely without factual support. Self-evidently neither the ordinance nor the judgment, as Judge Burke noted below (R. 200), proscribes all future excavations at the site. Indeed, some 18 acres of land remain which have not yet been excavated and are still available for whatever sand they might contain. Appellants' gratuitous suggestion that these 18 acres are needed for processing and the dissenting opinion's observation that the photographs show this area "to be entirely occupied by the machinery used in the operation of the sand and gravel pit" (R. 205-206) are simply inaccurate and have been rejected, as matters of fact, by all the courts below. The photographs speak for themselves and reference to the topographical survey (Pltf's. Ex. 3, R. 36) and arithmetical computation from the figures supplied there would indicate that some 110,000 cubic yards of earth can still be mined in conformity with the ordinance in the unexcavated portion of the tract.

The flat statement in the dissenting opinion that the cost of refilling the existing excavation is in excess of $1,000,000 (R. 203) is another interpolation. No evidence to that effect was introduced at the trial. The figure was mentioned for the first time in the Court of Appeals by appellants' counsel. It was borrowed by the dissent, intact and without apparent challenge, from appellants' brief in the Court of Appeals.

Moreover, there is nothing in the record to show that this 38 acre tract—about one-half of which is taken up with the pit—might not have some other valuable use even if unavailable for sand or gravel mining. Appellants continue to evade this issue by suggesting that it was the Town's burden to establish that there is another valuable use. The contrary is clearly the law; the burden of proof lay with the appellants. If the appellants would rely on a claim that their property has been rendered useless, they and not the Town must offer proof establishing uselessness. This they did not even attempt to do. Their failure to eliminate the possibility of another valuable use for the land obliges the Court to the contrary assumption (See *City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505; *Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232).

The argument based upon the alleged prohibition and total deprivation of a substantial and potentially profitable use has an additional fundamental debility. It rests, of course, upon the assumption that the right to continue dredging was a valuable one. But it was nowhere established that there remained any sand or aggregate that could be profitably mined in the present water-filled excavation where further dredging has been enjoined![1] Appellants' counsel are aware of this critical failure of proof and have strained to draw helpful inferences out of the meagre proof available to them in the record. Thus, they attempt to argue that since they mined sand prior to enforcement of the ordinance it must be presumed that they could have continued to mine sand profitably! Surely no presumption of continuance is appropriate in this case. Indeed, if inferences are to be drawn they must militate

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[1]None of the exhibits indicates whether there is anything to be mined under the water-filled portion of the tract. The fact that varying depths are indicated in the topographical survey, as pointed out by appellants, is inconclusive. Those maximum depths very likely were established as a result of exhaustion at given points in the pit.

against the possible existence of substantial deposits under the already excavated part of the 38 acre tract. Concededly, this excavation had been continuously mined for some thirty years prior to the subject ordinance. Each year of excavation brought this depleting asset closer to the point of practical economic exhaustion. On this record, that point might very well have been reached at or about the time the instant injunction became effective. Certainly, it is clear that the onus of proving otherwise lay with the appellants and not with the appellee Town. They failed in this regard; there is no proof that there was something left underwater which could be profitably mined.

Appellants' failure to prove that there remained something of value yet to be mined in the subterranean portion of their tract renders irrelevant the extent of their investment in the business. But even if the subject were relevant, it would merely present another contention for which appellants can produce no factual support in the record. The only evidence as to value of the investment which the record contains is the testimony that the assessed valuation of this tract was $66,000. From all that appears, however, that value is allocable to the 18 acres left undisturbed by the judgment and consequently tends in no way to confirm appellants' present contention that their property has been rendered valueless.

Appellants, in an implicit concession of their total failure of proof on this issue, seek to supply, by reference to the record of one of the previous trials between these parties, evidence as to the value of their operation. Appellants point to testimony on the trial of the zoning ordinance case in 1956 (Aplts.' Br., pp. 21-22). That testimony, however, was never introduced as evidence on the question of value and cannot be considered on that question here. Its admissibility was specifically limited to the question of *res judicata*, a defense which has been, formally at least, abandoned. Thus, in accepting the transcript of the testi-

mony in the zoning ordinance case, the Trial Court stated that ". . . It is only allowable on affirmative defense number one, res judicata. Otherwise it is pure hearsay" (R. 124-125; R. 96-97; see Richardson on Evidence, 8th Ed. §§ 275-286).

This disregard of the facts and record is continued at another point in appellants' brief (p. 21) where they make the bland assertion that the Trial Court refused to permit evidence of the value of appellants' land and investment. This is another inaccuracy which the dissenters in the Court of Appeals appear to have accepted without challenge (R. 204). Appellants have reference to a single question deemed improper by the Trial Court. On the direct examination of Mr. Goldblatt, he was asked what the approximate value of his structures and equipment was (R. 119). No foundation had been laid; there was no evidence as to the nature of these structures or equipment and, most importantly, there was no evidence that the value of these structures and equipment, whatever that value might have been, would be affected by the judgment. Under the circumstances, the inquiry was not shown to be material and the objection was sustained. The very next question, which was confined to the land upon which the excavation was made, the Trial Court deemed appropriate (R. 119).

There are other factually inaccurate premises in the substructure of appellants' argument in this Court. In the Court of Appeals, appellants had contended that their pit was in total conformity with Ordinance No. 16 as adopted in 1945 and before the amendment adding the water table provision. Appellee responded by flatly denying that assertion and by pointing out to the Court that no folio citations had been offered to support it. Certainly, the Town did not concede any such fact. Despite this, however, Judge Van Voorhis in the Court below repeated appellants' statement in his dissenting opinion

in these words ". . . The gravel pit was operated in accordance with a 1945 ordinance and is admittedly in conformity therewith." Again in the Jurisdictional Statement submitted by appellants in this Court, the statement was repeated, this time with what appeared to be supporting reference to the record (Jurisdictional Statement at p. 5). In its motion to dismiss, however, appellee demonstrated that all of the folio references supplied by appellants pertain to the fence provision exclusively and that appellants had made no attempt to show that their pit complied with all the other provisions of the ordinance before its amendment (Motion to Dismiss, p. 8). Now, having twice been confronted with the inaccuracy of the contention, appellants repeat this false assertion (Aplts' Brief at p. 4) and this time without reference to *any* portion of the record!

At various places throughout their brief appellants suggest, as they did in the Court below, that it is the position of the Town and the sense of Ordinance No. 16 that the business of excavation of sand and gravel is *per se* evil and should be extinguished. Appellants point to the fact that in the United States, and more particularly in New York State, this industry is an extensive and an important one. Appellee readily concedes the accuracy of appellants' statistics (which were also made part of the dissenting opinion)[2] but rejects the implication as an absurd one. Ordinance No. 16, as even a superficial reading will show, recognized the fact that sandpit operations are not intrinsically evil. It does not prohibit all sandpits; it merely requires that they be maintained in conformity with certain minimal safety standards. There are today a number of operating sandpits in Nassau County, all the Towns of which have ordinances like plaintiff's Ordinance No. 16.

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[2]Appellee concedes that this Court may take judicial notice of these statistics just as it may take judicial notice of the statistics of drownings in Nassau County sandpits.

These sandpits can be and are operated in conformity with the provisions in the applicable ordinances. An apt and ready illustration is the Colonial Sand & Gravel pit involved in the case of *Town of North Hempstead* v. *Colonial Sand & Gravel Co., Inc.*, 14 Misc. 2d 727, 178 N.Y.S. 2d 579 (Sup. Ct., Nassau Co., Hogan, J.).

Another straw man argument raised by appellants for the first time in the Court of Appeals centers about a distorted analysis of the clear terms and simple meaning of the judgment (R. 12-14). This analysis results in the conclusion that the judgment requires them to refill the entire 20 acre excavation *whether or not* they propose to resume excavating. The judgment appealed from, however, contains no such provision; it provides only that excavating be terminated until the ordinance's regulations are satisfied. There is no separate affirmative mandate which operates without regard to the resumption of excavation operations. When appellee pointed this out below, appellants conceded that the judgment now entered did not contain an affirmative refill requirement by pointing out that their argument was actually made in anticipation of appellee's bringing a separate subsequent proceeding to require a refilling of the pit (Appellants' Reply Brief in the Court of Appeals at p. 10). At that point, the matter was clearly irrelevant to the case at bar. All of this notwithstanding, Judge Van Voorhis of the Court of Appeals treated this case as though it involves a mandatory judgment requiring refill by appellants.

One additional important misconception should be noted. In his opinion, Judge Van Voorhis stated that during the oral argument the attorney for the Town said that the Town does not contend that the pit in question amounts to a nuisance (R. 204). This single factor may very well have been a decisive consideration in Judge Van Voorhis' deliberations. Certain it is that the assumption is important to appellants' position as argued in this Court. But as a matter of fact the statement in the dissent is

not accurately descriptive of appellee's contention on oral argument. Whatever the cause of the misunderstanding, it should have been clear to the entire court, as it apparently was to the majority, that appellee made no such concession. Indeed, at every stage of the litigation, throughout a total of six written briefs or memoranda and argument in four different courts, appellee argued quite the contrary. It has been appellee's consistent position that whether or not the pit could be said to constitute a technical "nuisance" is not decisive and that, in either event, appellants have failed to bear the burden of proving the ordinance unreasonable. Equally consistent has been appellee's position that the pit with its numerous violations of the ordinance *does* in fact constitute such a nuisance. The Trial Court so held, in effect (R. 183-184) and was affirmed by both Appellate Courts. The argument was thus spelled out with simply clarity in appellee's brief in the Court of Appeals. "Pits like the subject one constitute such a public nuisance" (Appellee's "Respondent's Brief in the Court of Appeals" p. 33, also pp. 16-17; 38). This argument was acknowledged by appellants (Appellants' Reply Brief in the Court of Appeals, p. 19). That contention was repeated by appellee's counsel throughout his oral argument in the Court of Appeals and although appellants now eagerly subscribe to the "concession" described by Judge Van Voorhis, no mention of the alleged concession was made by their counsel in his reply argument before the Court of Appeals.

Thus, it should be clear that the position of the dissenters in the Court of Appeals, now taken by the appellants in this Court, is bottomed upon a series of factual hypotheses that have no place in the case at bar or, for that matter, in reality. When the case is limited to the facts in the record, the facts found and affirmed by all the courts below, the order appealed from is clearly supported by the cumulative impact of compellingly appropriate and well established decisional principles and must be affirmed. Those principles are briefly set out in the following pages.

Summary of Argument

(I). Ordinance No. 16 is attended by a presumption of constitutionality. This presumption is buttressed in the case at bar by the commonly known and judicially held menace to life and property posed by pits like the one in question. Appellants, upon whom the burden of proof lay, failed to rebut the presumption by adducing substantial evidence clearly establishing a lack of nexus between the ordinance's provisions and the objective it sought to achieve. This failure of proof was so extensive that it included even a failure to establish the loss of anything of substantial value.

A great deal of the difficulty with appellants' position arises out of their attempt to confuse the present ordinance with pure zoning ordinances like those involved in *People* v. *Miller* (304 N. Y. 105); *Town of Somers* v. *Camarco* (308 N. Y. 537); and *Harbison* v. *City of Buffalo* (4 N. Y. 2d 553). These ordinances differ with the present one as to both effect and objective. This ordinance is not an absolute prohibition but merely a regulatory enactment directed against a serious threat to public health and safety. Although it has not been proven here, even had appellants established an utter prohibition, Ordinance No. 16 would nonetheless be constitutional because of the seriousness of the evil against which it is directed (*Reinman* v. *City of Little Rock*, 237 U. S. 171; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155; see also 41 Col. Law Review, 457, 459-467).

(II). The judgment in the 1956 action by the Town of Hempstead against appellants involved a separate and distinct ordinance, the Zoning Ordinance of the Town of Hempstead, and not Ordinance No. 16. Consequently, the rights declared in that judgment are not impaired by

the judgment in the present case. Since the rights affected by the present judgment cannot be said to have vested in the first judgment, there has been no unconstitutional deprivation of a "vested interest". Basically, the argument made by appellants in their Point II is indistinguishable from the argument made in the courts below under the title *"res judicata"*, which argument was rejected specifically by the Supreme Court of Nassau County in an earlier action on Ordinance No. 16.

(III). The defense of *ex post facto* is inappropriate here because this is a civil action which does not involve the penal aspects of Ordinance No. 16. Moreover, the existence of the "Separability" clause in Ordinance No. 16 makes it unnecessary to consider the question of *ex post facto* at this time. The argument that the ordinance is a bill of attainder, raised for the first time on this appeal, is also inappropriate.

POINT I

Appellants did not rebut the presumption of constitutionality which attends the subject ordinance. There is a total lack of proof tending to prove the regulations adopted to be unreasonable or confiscatory. Moreover, even as altered by appellants' brief, the record fails to establish an unconstitutional "taking".

In its broadest terms, the legal question here is whether Ordinance No. 16 of the Town of Hempstead as applied to the appellants, is a valid exercise of the Town's police power.

Unquestionably, appellee Town is—and was at the time of the adoption of the subject ordinance—empowered to enact and enforce, by injunction, ordinances regulating the operations of sand or gravel pits and "prohibiting the use

of any lands or other premises for the aforesaid purposes which do not comply with such regulations" (Town Law, §§ 130 (23); 136 (12); 135).

Ordinance No. 16 was passed pursuant to this authorization.

In their brief, appellants argue that Ordinance No. 16 is unconstitutional because, as to them, it is a totally prohibitory and confiscatory regulation. Not only is this argument completely vulnerable from a legal point of view, but as already shown it lacks vigor in view of the appellants' failure of proof on this issue.

The particular facts involved in litigation like this are indispensable to the determination of a constitutional question. Generalizations offer little help. (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393).

Appellants, in an effort to bridge the gap of absent evidence, have squarely tried to put the burden of proof on appellee. This is the bedrock of the agument in their brief challenging the validity of the ordinance. As framed by appellants, this position misconceives well-established law. Ordinance No. 16 comes before the Court attended by a weighty presumption of reasonableness and constitutionality. This presumption assumes the existence of necessary factual support for the enactment's provisions (*Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 209, 210). If any state of facts, which are known or can be assumed, justifies the law, the Court's power of inquiry ends (*U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298). Concededly, the ordinance must be related to some evil or threat to the community's welfare but that evil need only be reasonably apprehended (*Matter of Stubbe* v. *Adamson*, 220 N. Y. 459, 469; *Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, 219). Questions as to the wisdom, need or appropriateness of the enactment are for the legislative body (*Olsen* v. *Nebraska*, 313 U. S. 236, 246). Consequently, the onus of showing the lack of justification for the specific regulations adopted or

their unreasonableness, rests upon the party making the attack (*Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, 118; *N. Y. Trap Rock Corp.* v. *Town of Clarkstown* (1 A. D. 2d 890, 149 N.Y.S. 2d 290 (2nd Dept.), aff'd w/o opinion 3 N. Y. 2d 844) and to satisfy it unconstitutionality must be demonstrated beyond a reasonable doubt (*Defiance Milk Products Co.* v. *Du Mond*, 309 N. Y. 537, 540-541; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 79).

Certainly the evil here is, at the very least, "reasonably apprehended" (*Matter of Stubbe* v. *Adamson, supra*). The commonly known history of drownings and other accidents in pits like this one, speaks ominously but eloquently in justification of the provisions of Ordinance No. 16. Of course no court can close its eyes to such common knowledge in judging the propriety of a police power regulation like the subject one (See *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500; *U. S.* v. *Carolene Products Co.*, 304 U. S. 144, 154; *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298). It is particularly cogent in this case where the pit involved is in reality a huge sprawling crater, filled with water to an average depth of some 25 feet, forming a permanent artificial lake in a densely populated community abounding with thousands of children.[3]

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[3] Appellee has already noted that in the court below it asked that judicial notice be taken of the drowning of a child in the pit here in question. It also pointed out to the court the Nassau County Police statistics which reveal a long line of drownings in pits like the subject one. This proof was never introduced at the trial only because it was not needed; defendants (appellants here) had offered no proof sufficient to require further buttressing of the presumption of constitutionality. Certainly these statistics are entitled to at least the same consideration that this Court will give to the speech made by Honorable Douglas McKay (see Appellants' brief, p. 27) the 1959 statistics of the United States Bureau of Mines (Appellants' brief, p. 27); "the report" of projected condemnation proceedings against a Nassau County sandpit (Appellants' brief, p. 34); and the "current price" of fill (Appellants' brief, p. 35) all of which matters found their way into this case by way of Appellants' brief and not the record.

Other considerations, like the detrimental effect of this pit on property values in the neighborhood and aesthetics, although not by themselves conclusive, further evidence the reasonableness of this ordinance (See *Matter of Wulfsohn* v. *Burden*, 241 N. Y. 288, 298; *Post Brick Co., Inc.* v. *Thompson, supra; People* v. *Gerus*, 69 N.Y.S. 2d 283, 291 (Co. Ct. Nassau Co., Johnson, J.) (not officially reported).

This is not a novel situation. Sandpit ordinances in material and substantial part identical or similar to the one at bar have frequently been before the courts. With exceptionless consistency, they have been upheld as reasonable exercises of the police power. *Town of North Hempstead* v. *Colonial Sand & Gravel Co., Inc.* (*supra*); *Town of Huntington* v. *Broad Hollow Estates, Inc., supra; People* v. *Gerus, supra; Lizza & Sons, Inc., et al.* v. *Town of Hempstead*, 69 N.Y.S. 2d 296, aff'd 272 App. Div. 921. 71 N.Y.S. 2d 14 (2nd Dep't); *People* v. *Sessano*, 176 Misc. 723, 29 N.Y.S. 2d 45 (Ct. of Special Sessions, N.Y.C. App. Part, 2nd Dep't); *Post Brick Co., Inc.* v. *Thompson, supra; Krantz* v. *Town of Amherst*, 192 Misc. 912, 80 N.Y.S. 2d 812 (Sup. Ct., Erie Co.); *People* v. *Calvar Corp.*, 286 N. Y. 419.

These cases illustrate vividly the nature of the problem dealt with by ordinances like the subject one and the complete propriety of the regulations they promulgate. The problem was described aptly in the *Broad Hollow* case, (*supra*). The ordinance there was similar to Ordinance No. 16. In declaring the law valid in its application against a sandpit the Court (Hooley, J.) said:

> "Without regulation many sand and gravel pits would become a menace to the public, would endanger the lives of young children and it is a matter of common knowledge that heretofore many lives of young children have been lost in these unguarded sandpits . . . The lack of regulation unless corrected will no doubt leave large tracts of land . . . blighted land-

scapes and barren wastes, vast excavations filled with water, and nuisances to the surrounding property because of sand and dust blown by the wind. Surrounding property will be depreciated in value by the lack of regulation and the general welfare, public safety and public health will tend to be preserved by the ordinance which is attacked in this litigation. The maintenance and preservation of property values and the happiness and prosperity of the people residing in the township will be promoted by the ordinance which is subject to attack here." *Town of Huntington* v. *Broad Hollow Estates, Inc., supra* at p. 12 of N.Y.L.J.) (Emphasis supplied.)

Almost twenty years earlier—before the dramatic population increases of Long Island—Mr. Justice Hallinan had already pointed out that pits like this one are serious hazards amounting to public nuisances. In the *Post Brick* case (*supra*), he held:

> "Of course, there can be no question, after examining the photographs of the excavations thus far made, that esthetically the surrounding property suffers as a result, but that is not the only damage which upon the evidence adduced at the trial, is likely to stem from such use. The deep excavations as demonstrated in the photographs, are filled with water, and on the face thereof constitute hazards which amount to public nuisances." (*Post Brick Co., Inc.* v. *Thompson*, 68 N.Y.S. 2d 159, 161) (emphasis supplied.)

This conclusion was echoed by Mr. Justice Cortland Johnson in the *Gerus* case (*People* v. *Gerus*, 69 N.Y.S. 2d 283, 291).

Viewed in the context of the problems and hazards that inspired Ordinance No. 16 the specific regulations it contains are on their face obviously suited for the curtailment and suppression of these dangers, as the Trial Court

specifically found. Thus, the requirements concerning setbacks, degree of slope, barricades, fences, lights, retaining walls and the maximum ground water level, all provide protection against the danger of cave-ins, falls, drownings and water pollution.

All these considerations of public safety, convenience, comfort and prosperity must be taken together when determining the propriety of police power regulations. When those considerations, as applicable here, are combined with the presumption of constitutionality, the irresistible conclusion is that the instant ordinance is in its terms reasonable.

The existence of the presumption of validity and the fact that the burden of proof lay with defendants is nowhere challenged in our law. Concededly, this presumption is not, in the first instance, a conclusive one; it is rebuttable by clear and convincing proof. Whether in a given case the presumption has been overcome is, in the words of Mr. Justice Holmes "a question of degree" (*Pennsylvania Coal Co.* v. *Mahon, supra*). The simple fact is that here appellants did *not* clearly establish—indeed offered no worthwhile proof to show—a lack of nexus between the plain hazard sought to be avoided and the protective measures selected by the Town's governing body.

The appellants' proof, all of it through Mr. Goldblatt, himself one of the appellants, was at best, sparse. Mr. Goldblatt testified that there had been no cave-in at the pit (R. 121). That circumstance is not determinative (see *City of Rochester* v. *West*, 164 N. Y. 510, 514; *Town of Southport* v. *Ross*, 284 App. Div. 598, 132 N.Y.S. 2d 390, 392 (3rd Dep't) (R. 183)). Mr. Goldblatt testified that the existing fence at the pit is inspected "about twice a week" (R. 84). Inspection at an excavation like this one on an approximate semi-weekly basis could hardly be said to be a substitute for the concrete curb require-

ment the Town Board prescribed as a safety measure to thwart precocious children from burrowing under the pit fence. Pit operators cannot find immunity from regulatory ordinances by selecting their own safety precautions. Otherwise, the administration of this ordinance would become hopelessly chaotic. Mr. Goldblatt testified that the slope at the pit at 45 degrees is stable. Surely his opinion of stability would not establish that the ordinance's requirement was oppressive or unreasonable. The extra precaution, if it be that, fixed in this ordinance must be viewed as an enactment of the Town Board designed first to preserve human life—the lives of those legally in the pit as well as trespassing children—and second to preserve neighboring property contiguous to the pit.

The appellants' challenge, directed as it is to the wisdom or to the reasonableness of Ordinance No. 16, is reminiscent of an unsuccessful challenge made by the owner of a lodging house in *Queenside Hills Realty Co., Inc.* v. *Saxl* (328 U. S. 80). In the *Saxl* case, an amendment to the Multiple Dwelling Law required the owner of a lodging house to install and maintain a sprinkler system. As in the case at bar, the owner in *Saxl* argued that its own precautions were more than adequate to meet the evil at which the statute was aimed. The owner argued that compliance with the statute would be economically devastating.

Mr. Justice Douglas responded to that argument in this way:

> "Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human

> life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum." (at pp. 82-83)

This language also supplies the short and conclusive answer to the suggestion in Judge Van Voorhis' dissenting opinion that the provisions of the 1945 ordinance in its original form were adequate protection and that, consequently, the requirements added by amendment were excessive (R. 206).[4]

On the question of appellants' rebuttal of the presumption of validity, the Trial Court correctly noted:

> ". . . the defendants have failed to sustain their burden of proof; in fact, little, if any evidence was adduced to show the unreasonableness of the provisions concerning the width of the beams, fences, depth requirement and the like" (R. 183).

The other testimony to which appellants point, patently did not either establish that the ordinance requirements were unreasonable, or that this pit was within the prescribed minimal safety limits.

The presumption of reasonableness, in the absence of sufficient rebuttal evidence, was conclusive.

Much of the argument made by appellants evolves out of an analysis which confuses the present ordinance with pure zoning ordinances like those involved in *People* v. *Miller, Matter of Harbison* and the other similar cases relied upon by appellants. The subject ordinance differs with these in regard to both effect and objective. As to

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[4] As we have already shown, this portion of Judge Van Voorhis' opinion was based upon the erroneous premise that appellants conformed with the ordinance before amendment.

effect, as has already been pointed out, Ordinance No. 16 is not a zoning ordinance prohibiting sand mining in the Town of Hempstead; it merely regulates that use. To argue, as do appellants, that it confines sand mining within certain minimum depths and that consequently it amounts to "prohibition" is an exercise in semantics and not helpful here. Every regulation necessarily prohibits to some degree (*Kentucky Whip & Collar Co.* v. *Illinois C. R. Co.*, 299 U. S. 334).

The distinction with regard to objectives is the larger and more significant one. Ordinances which are directed against threats to the public health and safety, as is Ordinance No. 16, are treated differently than ordinary zoning ordinances which have as their principal objectives aesthetics, building and land value and the maintenance of order and convenience. This second distinction is even more important than the first since an ordinance directed against a public nuisance may go so far as to prohibit absolutely such a use without requiring compensation. The law does not require the community to pay for protection against threats to its health or safety.

It is actually not necessary in this case to implement the latter distinction since, as appellee has shown, appellants have failed to prove an absolute prohibition and consequent substantial economic loss in the case at bar. These two ingredients constitute the substance of the "confiscation" argument as the appellants make it. Thus, it was necessary for appellants to clearly prove that their property has been permanently deprived of *any* profitable use (*Arverne Bay Construction Co.* v. *Thatcher*, 278 N. Y. 222, 232). Additionally, in order to establish a loss, appellant had the burden of proving that there was left in the excavation sand and gravel that could be economically mined. Appellee has shown the gross failure of proof by appellants on these questions. Without clear proof this Court has no alternative but to sustain the presumption of validity;

the Court cannot interpolate evidence of confiscation into the record by assumption (*City of Yonkers* v. *Rentways, Inc.*, 304 N. Y. 499, 505).

Since appellants have failed to establish that the effect of enforcement of Ordinance No. 16 against them is a practical prohibition of use of the premises and that they have suffered a substantial economic loss as a result, the Court need not pass upon the reasonableness of the ordinance as applied to such a situation. However, even if appellants could have established that to be the fact, the case would not be governed by the authorities offered the Court by appellants. The pristine aim of the zoning ordinance in this country was an aesthetic one. Traditionally, this consideration has not been deemed sufficiently important to justify the total destruction of substantial interests. But from time immemorial the inherent power of a community to protect itself against uses which threaten the public safety has been recognized. Thus, there is no doubt that a use which the legislative body finds dangerous to health or safety can be prohibited by the municipality (see e.g. *Hadacheck* v. *Sebastian*, 239 U. S. 394; *Reinman* v. *City of Little Rock*, 237 U. S. 1; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155; 41 Col. Law Review, 457, 459-467). The difference between zoning ordinances and ordinances like the subject one in this regard is constantly noted. The very law review authorities cited to the Appellate Division and to the Court of Appeals by appellants below serve as good examples (see e.g. 102 U. of Pa. Law Review 93, at 93-94, 102; 44 Corn. Law Quart. 450, 452, and see particularly 1951 Wis. Law Review 685, 692-695. See also 41 Col. Law Review, *supra*).

It is clear that pits like the subject one constitute the kind of dangerous use that may be eliminated (see *Town of Huntington* v. *Broad Hollow Estates, Inc.*; *Post Brick Co.* v. *Thompson*; *People* v. *Gerus*, all *supra*).

POINT II

The judgment in an earlier action on the appellee Town's zoning ordinance is not unconstitutionally impaired by the judgment below. The subject matter of the two actions and the rights they affect are totally different.

In substance the argument made under Point II of appellants' brief is identical with the argument made by appellants in all the courts below to the effect that the judgment in the 1956 action before Mr. Justice Hill was *res judicata* of the issues raised here. Whether stated as it was below or cast in constitutional terms as it is in this Court, the argument is equally vulnerable. The thrust of this contention is that once rights have been established by a judgment, those rights are deemed vested and cannot be impaired either by subsequent legislation or a second judgment.

The essential difficulty with the position of appellants on this score is the fact that the rights and duties affected in the instant action were never before Mr. Justice Hill in the 1956 case. The issues were basically different. The first action was brought by the Town of Hempstead to enjoin appellants from the operation of a use forbidden by the Town *zoning* ordinance. By its very nature it sought to prohibit appellants' excavation business on the subject property. It was not an action brought under Ordinance No. 16 which regulates such uses regardless of their geographical location (see Appendix to Appellants' Brief, Exs. 2 & 3).

The prior action resulted in a determination that the *zoning* ordinance was ineffective as against appellants' operation since their use had been in existence prior to adoption of that ordinance. The right established or declared in that action was the right to operate in a "B" residence zone despite the zoning ordinance. Since it was not an ac-

tion to enforce Ordinance No. 16 it obviously could not pass upon any alleged rights of the appellants with reference to that separate, regulatory ordinance of the Town.

Plainly, therefore, the question of whether or not the appellants have a non-conforming use with regard to the zoning ordinance is irrelevant to the inquiries to be made in this action. As has already been indicated in Point I of this brief, a non-conforming use, whether judicially declared or not, creates no immunity as against the operation of a regulatory ordinance like the one at bar.

Actually the question now before this Court has already been passed upon by the Supreme Court, Nassau County. In 1956, after the prior action referred to by appellants, the Town of Hempstead brought suit against the owners and operators of the pit for an injunction because of violations of the very ordinance here *sub judice* (Spec. Term, Part I, Sup. Ct., Nassau Co., Inc. #6447/56 (Defts.' Ex. E)). Appellants moved to dismiss the complaint in that action on essentially the same grounds they now urge in their Point II; they contended that the earlier decision of Mr. Justice Hill was *res judicata*. In deciding against appellants, the Court stated in an opinion by Mr. Justice Christ:

> "Some reliance is placed by the defendants upon the wording of one of the provisions in the judgment in that prior litigation. The clause in question provides in substance that the defendants have a prior non-conforming use in the conduct of a sand and gravel business which may be carried on upon the entire premises described in the complaint 'notwithstanding any ordinances of the plaintiff'. The defendants cannot rightfully contend that such language is sufficient to give immunity against any ordinances whatever of the Town of Hempstead. The judgment in the earlier action was rendered in litigation which was concerned only with the attempted enforcement of the zoning ordinance.
>
> • • •

> The earlier litigation and the present lawsuit are identical so far as parties plaintiff and defendant are concerned. However, the issues determined in the earlier litigation are not the same as those raised by the present lawsuit. In the former litigation the basic issue which was tried and determined was the existence or non-existence of a non-conforming use under the zoning ordinance of the Town of Hempstead . . . The present suit is not concerned with the zoning ordinance at all."

After decision on this motion, the case was discontinued without prejudice.

This essential difference in the rights established by the two actions with which we are here concerned makes all the cases cited by appellants in Point II of their brief inapposite. Those cases hold simply that where rights have been established by a judgment, those precise rights are deemed vested and subject to all the traditional immunities and deference owed to vested rights. But obviously the only rights that can be said to vest are rights which the court granting the judgment was competent to affect. In essence it is the position of the appellants here that the judgment in the first case under the zoning ordinance established the right of the appellants to continue their operations at the premises regardless of any other ordinance that had been or might thereafter be adopted. The conclusion is a preposterous one. As Mr. Justice Christ and the courts below have held, the judgment in that first action spoke only with reference to the appellants' rights *vis-a-vis* the zoning ordinance. No other rights were in issue and no other rights could be "vested".

POINT III

The defense of *ex post facto* is inappropriate to this civil action. In any event, there is no present occasion to pass on the question. The ordinance does not amount to a bill of attainder.

In the Trial Court appellants raised the defense of *ex post facto* and it was there held that the defense had no application to this civil proceeding (R. 182). This finding was affirmed by the Appellate Division. In the Court of Appeals appellants' new counsel thought so little of the defense that they abandoned it—making no mention of it either in their briefs or upon oral argument. This notwithstanding, Judge Van Voorhis stated in his dissenting opinion that the criminal aspects of Ordinance No. 16 might be considered violative of the Constitution as an *ex post facto* law. He did not explain what relevance that conclusion might have to the case at bar. On the strength of its mention in the dissenting opinion below, appellants have resuscitated the argument here in their brief's final point, Point III.

The answer to appellants' contention can be a short one. There is a punitive or criminal aspect to the subject ordinance, but that aspect is confined to Section 10, entitled "Penalties". That section was not sought to be enforced by appellee in this action. This action is purely a civil one and in such an action the defense of *ex post facto* is inappropriate (*Bankers Trust Co.* v. *Blodgett*, 260 U. S. 647, 652; *Matter of L'Hommedieu* v. *Board of Regents*, 276 App. Div. 494, aff'd 301 N. Y. 476.) Moreover, the ordinance contains a "Separability" section which provides that if any part of the ordinance is declared invalid that declaration of invalidity shall not affect the remainder of the ordinance (Section 11, opp. p. 8 of R.) The penalty clauses, therefore, even if themselves unconstitutional, are severable and consequently there is no present occasion to pass upon their validity (*Ohio Tax Cases*, 232 U. S. 576, 594; *Phoenix Ry. Co.* v. *Geary, et al.*,

239 U. S. 277, 283; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma, et al.*, 286 U. S. 210; *Sonzinsky* v. *United States*, 300 U. S. 506, 512; *People* v. *Lathrop*, 3 N. Y. 2d 551).

In their brief in this court, for the first time, the appellants make the argument that the application of Ordinance No. 16 to their pit amounted to a bill of attainder. This point was not raised in any of the courts below. Indeed, even Judge Van Voorhis, who discussed the *ex post facto* argument despite the fact that appellants themselves had abandoned it, did not mention bills of attainder. Appellants cite, as support for their contention, *Flemming* v. *Nestor* (363 U. S. 603), and make the point that the prohibition against bills of attainder is not necessarily limited to punishment consisting of the classic criminal sanctions of fine and imprisonment, but also includes punishment involving forfeiture of property rights. However true this may be, certainly the prohibition has not been expanded so as to embrace every situation where a duly adopted police regulation results in hardship to an individual. Indeed, the *Flemming* case itself makes that clear. In writing for a majority of the Court, which held that the legislation there involved did not constitute a bill of attainder, Mr. Justice Harlan pointed out that legislation directed to an activity rather than the individual involved in that activity, can in no case be considered a bill of attainder. The unlawful prohibition results only where the statute in question is evidently aimed at a specific person or class of persons (*Flemming* v. *Nestor, supra* at p. 614). (See also *DeVeau* v. *Braisted*, 363 U. S. 144, 160.) The subject ordinance plainly is directed not at individuals but at an activity, to wit, excavating, and results not in punishment but in regulation.

Concluding Comment

Many of the issues raised by appellants and necessarily discussed by appellee are peripheral ones. The ultimate question here is whether the challenged ordinance is rea-

sonably adapted to achieving the desired result. That it is reasonably adapted, is in the first instance presumed. A contrary conclusion can be reached only on the basis of substantial evidence clearly rebutting the presumption. There is no such rebuttal evidence here and consequently the presumption remains intact.

For the most part the argument by appellants in this Court, and in the Court of Appeals below, is an elaborate attempt to fill the gaps in their evidence by shifting the burden of proof to appellee or by simply altering the record—on occasion quite subtly—to suit their needs. The appellee submits that an examination of the record will reveal the insuperable deficiency in appellants' arguments and evidence and will lead this Court to the same conclusion reached by all the courts below.

In any event, this Court should consider the existence of the "Separability" provision contained in Ordinance No. 16 and earlier noted in this brief. If despite what appellee has pointed out in this brief, this Court should find any provision of the ordinance to be unreasonable, then the "Separability" provision should be implemented to save the substance of the ordinance.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 78

HERBERT W. GOLDBLATT, *et al.*,

Appellants,

against

TOWN OF HEMPSTEAD,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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IN THE

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Crushed Stone Association, which describes itself as "a trade association composed of commercial producers of crushed stone throughout the United States and Canada", moves this Court for permission to file a brief *amicus curiae* in connection with the above captioned appeal. Apparently anticipating this Court's favorable disposition of its motion, the Association appends to its request the brief which it seeks permission to file.

The appellee, Town of Hempstead, opposes the request for permission to file this brief *amicus curiae* on the grounds that the Association has failed to establish its

interest in the outcome of this appeal, and that the arguments it would urge are either irrelevant or duplicative of arguments already made by appellants.

The request for permission to file, and the brief itself, operate from the false assumption that the Court of Appeals of New York has held that *all* quarrying operations are evil and that as a result, the decision will prove devastating to the sand mining and quarrying industry as a whole. (See proposed brief *amicus curiae*, at pp. 8-9). The simple fact of the matter is that this case does not affect the entire sand mining industry. This case concerns a narrowly drawn ordinance of a town on Long Island affecting particular types of sandpits; among them sandpits that have pierced the water table forming water-filled craters like the one in question here. The Association's proposed brief cites many alleged statistics and figures, and much data concerning the sand and stone industry, but nowhere does it attempt to describe how much of the industry involves pits like the one that is the subject of the present case. Certainly, not all sand mining is done under water. Indeed, from all that appears in the Association's brief, this type of excavation may be relatively rare.

Moreover, and more fundamentally, the ordinance in question is not a zoning ordinance which prohibits sandpits; it is a regulatory ordinance which says, in effect, that sandpits may exist but only in compliance with the regulations set out in the ordinance. Sandpits may and can operate in the Town of Hempstead under the terms of the ordinance; however, their depth is limited to a point short of the water table in order to guarantee against the formation of artificial lakes like the one created in the case at bar. The ordinance contains other proscriptions. The Association, however, treats the ordinance as though it were a zoning ordinance which absolutely prohibits sandpits and quarrying operations and proceeds from that base. All the courts below have recognized the distinction

between the regulatory ordinance here under discussion and zoning ordinances which are supported by entirely different rationales and have an entirely different prohibitive effect.

This is the particular vulnerability of the Association's position on this motion; its alleged interest is premised upon a total misconception as to the effect of this ordinance. The case at hand is a much narrower one than the Association, and for that matter—the appellants—would have the Court believe. When this case is seen in its true perspective it is clear that the Association has no interest sufficient to justify the filing of the proposed brief *amicus curiae*, and permission to do so should be denied.

CONCLUSION

The motion of National Crushed Stone Association for leave to file a brief *amicus curiae* should be denied and the proposed brief should not be considered.

Respectfully submitted,

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Appellee's theory that the 1958 Amendment of Ordinance No. 16 is not prohibitory but only regulatory is fallacious. The very terms of sections 4(h) and (j) of the Ordinance prohibit all future excavating under water on appellants' property and require the refilling of 20 acres under water theretofore for over 30 years. The undisputed evidence is that section 4(j) requires that 1,000,000 cubic yards of "clean non-burnable fill" be supplied by appellants to fill the excavation on these 20 acres 4

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ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

REPLY BRIEF OF APPELLANTS

Statement

Considering the appellee's brief as a whole and before replying more specifically thereto, we find two main contentions submitted in support of the constitutionality of Ordinance No. 16.

First, appellee contends that the Ordinance does *not* prohibit all further underwater excavation on appellants' property. This contention is factually erroneous (see our main brief, pp. 12-18 and Point I of this reply brief).

Second, based on the erroneous assumption that Ordinance No. 16 is not prohibitory but only regulatory, appellee argues the applicability of the undisputed rule of presumption of constitutionality in the enactment of *regu-*

latory legislation; and appellee then goes on to argue that appellants failed to overcome such presumption of constitutionality, which appellee assumes to exist in our case (see pp. 12-16 *infra*).

The foregoing main points were adopted in the majority opinion of the Court of Appeals (R. 199).

The presumption of constitutionality given to legislation which provides reasonable *regulations* in the conduct of a business is not applicable in our case because sections 4(h) and (j) of Ordinance No. 16 are *not* regulatory of excavation methods but prohibit *all* underwater excavation on appellants' property.

To state the matter in another way: even if we assume, *arguendo*, the major premise of appellee *viz*: that a presumption of constitutionality applies to Ordinance No. 16, that presumption is overcome and no longer exists, when it is shown—as it was in our case—that the "regulation goes too far" and becomes prohibition or "a taking" (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. at p. 416). We find not only a total prohibition of excavating, provided for in sections 4(h) and (j) (see Point I, *infra*) but we have a judgment in prior litigation between the same parties, which directly holds that the right of appellants to excavate under water on *all* of their property constitutes a legally protected "non-conforming use" of appellants' property. The judgment in that litigation (Exhibit 3 of our main brief), dated April 5, 1956, was, in effect, overruled and reversed by sections 4(h) and (j) of the 1958 amendment of Ordinance No. 16.*

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* Whatever the defense be in form (Appellee's brief, Point II), the substance of the matter is that the 1958 Ordinance directly and unqualifiedly prohibits exactly what the 1956 judgment permitted, *to wit*: excavating under water on "the entire premises" of appellants.

A major part of appellee's brief is devoted to an attempted showing of an alleged failure of appellants to overcome the presumption of constitutionality which is accorded reasonable, regulatory legislation. The incontrovertible fact (shown in our main brief pp. 12-18 and pp. 4-7 *infra*) that the Ordinance *prohibits* underwater excavation and wipes out appellants' legal, vested rights of their nonconforming use of underwater excavation, constitutes all the proof necessary to overcome any presumption of constitutionality and to demonstrate a "taking", in violation of the due process clause.

The fact that appellee has devoted so much of its brief to argumentation that there is no prohibition of excavation is an implied admission that if the Ordinance does provide for such prohibition, it would be unconstitutional as a taking without compensation.

Finally in this summary resumé of appellee's brief we consider appellee's attempt to substitute argument, in place of evidence, to establish that appellants' excavating business constitutes a nuisance in order to sustain the constitutionality of the Ordinance. Appellee tries to draw a word picture of danger or nuisance (without the benefit of proof) although in one place (brief p. 11) it disclaims any intention to contend that "the business of excavation of sand and gravel is *per se* evil" and states that "sand pit operations are not intrinsically evil".

We consider, at greater length hereafter, appellee's resort to judicial knowledge of (1) an alleged unreported drowning which took place before the appellee-Town itself required that appellants' property be fenced and (2) of alleged drownings "in other pits", the facts of which are not before this Court. At this point we limit our observation to the fact that appellee's resort to judicial knowledge demonstrates that appellee recognizes that in order to

sustain the constitutionality of prohibitory and confiscatory legislation, where nuisance is present,* appellee would have had to prove that appellants' excavating activities did constitute such nuisance. No such proof was supplied. To the contrary, appellants' activities did not constitute a nuisance.

We now consider appellee's brief in greater detail.

POINT I

Appellee's theory that the 1958 Amendment of Ordinance No. 16 is not prohibitory but only regulatory is fallacious. The very terms of sections 4(h) and (j) of the Ordinance prohibit all future excavating under water on appellants' property and require the refilling of 20 acres under water theretofore for over 30 years. The undisputed evidence is that section 4(j) requires that 1,000,000 cubic yards of "clean non-burnable fill" be supplied by appellants to fill the excavation on these 20 acres.

Recognizing the rule of law that "if regulation goes too far it will be recognized as a taking" and therefore in violation of the due process clause of the 14th Amendment (*Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. at p. 416) appellee has sought to avoid the application of this principle by arguing that Ordinance No. 16 is not a prohibition of excavation but only regulation, constituting "minimal safety standards" (appellee's brief p. 11).** In *Arverne Bay Con-*

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* As we pointed out in our main brief (pp. 23, 24) the "extreme cases" (328 U. S. at p. 83) where the constitutionality of prohibitory legislation of a business is found i.e. where nuisance is proved, would not be applicable in our case which involves the use of the land itself. See *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410-412 and see brief of *Amicus Curiae* in our case, pp. 15-26.

** This description of "minimal safety standards" was also used in appellee's brief in the Court of Appeals and the language was adopted, *in haec verba*, in the majority opinion of Judge Burke (R. 200).

struction Company v. *Thatcher*, 278 N. Y. 222, 226, the Court pointed out that an unconstitutional "taking" of property occurs when an ordinance precludes "its use for any purpose for which it is reasonably adapted". The Court stated (278 N. Y. at 232):

> "An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden." (Emphasis in original.)

In our case the "taking" is of the first type described in the *Arverne* case *viz*: a restriction of "any reasonable purpose" or use "permanently", where the property owner nevertheless remains "subject to the burden of payment of taxation". There is no other use—and appellee has not been able to suggest one—of appellants' 20 acres under water, other than underwater dredging or excavating; and since the Ordinance (section 4(j)) requires the refilling of the entire area under water, the only use (i.e. underwater dredging) has been eliminated. We noted in our main brief (p. 18) that an alternative use suggested by appellee in its briefs below, to wit: swimming and boating, was (a) impossible because of the Ordinance's mandate of refilling and (b) was contrary to appellee's unproven theory that the water on appellants' land is dangerous *per se*. Appellee has not repeated its suggestion of boating and swimming in this Court and has made no suggestion of any use, other than that of underwater excavating—which is proscribed by the Ordinance.

We considered the prohibitory nature of sections 4(h) and (j) of the Ordinance in our main brief (pp. 12-14).

Since appellee's contention that the Ordinance does not prohibit underwater excavating, constitutes the main prop of appellee's argument in support of constitutionality of the Ordinance, we pray this Court's indulgence to review again the provisions of the Ordinance, as applied to the undisputed facts in our case, which demonstrates that there is no question about the ultimate fact that we have here a case of confiscation and not "merely • • • certain minimal safety standards" (brief p. 11).

Section 4(h), *by its very terms,* prohibits all excavation "below two feet *above* the maximum ground water level at the site." Since appellants' excavation is now *admittedly*—and has been for 30 years—25 feet *below* maximum ground water level, there can be no question about the fact that appellants cannot continue their operations without directly violating the express provisions of section 4(h).

To put the matter another way: section 4(h) directly forbids all excavation below "two feet *above*" water level. Appellants' excavation is admittedly 25 feet (and as appellee points out (brief, p. 3), as much as 48 feet "in some places") *below* water level. The judgment appealed from (R. 14) recognizes this situation in providing that "the pit has been excavated substantially beyond points 2 feet above the ground water levels at the site" and correctly concludes that this constitutes one of the "violations of the said Ordinance No. 16".

The judgment (R. 13) enjoins further underwater dredging until appellants "shall have corrected" this violation. The *only* way to "correct" this "violation" of excavating below water is *not* to excavate below water. That is nothing more or less than total prohibition. The statement in the

majority opinion (R. 200) that "neither the injunction granted nor the ordinance proscribes any future excavation" is therefore unsupportable and is directly contrary to the very language of sections 4(h) and (j), as applied to the undisputed facts in our case.

We now consider how appellee has sought to avoid the clear language of sections 4(h) and (j).

First, appellee argues that there may not be any more sand and gravel to excavate from appellants' premises because excavation has been going on for 30 years. The answer to this suggestion is the direct and uncontradicted testimony that appellants have "not exhausted the available deposits" (R. 86). There was also testimony (R. 86) that as of the time of trial appellants were "actively mining sand and gravel at the premises". Only because of the judgment of injunction appealed from (R. 12-14) has there been a cessation of excavation activities. Furthermore, appellee's own statement (brief, p. 3) that the excavation under water (covering 20 acres of appellants' property) "is as deep as 48 feet . . . in some places", with "an average depth of about 25 feet", shows that there are some 23 feet of excavation to be removed over the area of 20 acres now under water (see appellee's exhibit 3).

Second, appellee argues (brief, p. 9) that appellants did not prove the amount of their investment in their excavation business. This is strange argument in view of the fact that appellee objected to the proof which appellants offered (R. 119) of the extent of their investment. Even the limited proof of investment permitted by the trial court showed a substantial figure of $66,000 (R. 119). Furthermore, as we pointed out in our main brief (pp. 21, 22) there was admitted in evidence the record of the previous litigation (appellants' exhibit I) which showed that the improvements and capital investment of equipment appellants

used in their excavation work totalled "approximately $241,000".

Thirdly, in order to overcome the conclusion that appellants' property has been taken without payment, appellee has argued that there *may* be other profitable uses of appellants' property. We anticipated this argument in our main brief (p. 18). We have also noted, *supra*, p. 5, that appellee cannot suggest any use of 20 acres under water, which the Ordinance requires appellants to refill.

Fourthly, we come to the argument, also anticipated in our main brief (pp. 16, 17), that there has been no confiscation or taking of appellants' property because 18 of the 38 acres owned by appellants is not yet underwater and may be excavated. At the risk of repeating, we reply:

(1) The requirement of section 4(h) limiting excavation to a point "2 feet *above*" water level means that there is very little to excavate on these 18 acres because this acreage is close to water level, as shown on appellee's exhibit 3.

(2) These 18 acres are used in conjunction with appellants' underwater hydraulic operations on the other 20 acres. The photographic exhibits (exhibits 6A-6U) show the location of dredging equipment, trucks and other equipment on these 18 acres.

(3) Even if it be assumed, for purposes of argument only, that 18 acres have not been taken that would not change the fact that the 20 acres have been taken. This argument that "approximately 18 acres are [still] available for excavation" was adopted in the majority opinion (R. 200).

Finally, in reply to the contention that there has been no confiscation or taking, we revert again to section 4(j) which requires that the 20 acres of appellants' property underwater be filled with "clean non-burnable fill". We

stated in our main brief that we knew of no statute or ordinance which goes as far as Ordinance No. 16, in requiring not only a prohibition of all underwater excavating but in affirmatively requiring (section 4(j)) that the excavation be filled, at the expense of the property owner. Appellee's brief does not dispute our statement about the uniqueness and drastic nature of this affirmative requirement of refilling an excavation covering 20 acres, legally made by appellants over a period of 30 years. In fact appellee has avoided any discussion of section 4(j) except to question appellants' estimated cost of $1,000,000.

With respect to this estimate of $1,000,000, the testimony of appellee's own witness is that 1,000,000 cubic yards have been removed (R. 63) and admittedly section 4(j) requires that these 1,000,000 cubic yards of fill be put back. The estimated cost of $1,000,000 is based on an estimate of $1 per cubic yard as the fair value or cost of "clean, non-burnable fill" (see p. 19 of the *Amicus Curiae* brief which reports $1 per cubic yard as a fair estimate of value or cost of fill).

Appellee does not suggest any other figure of reasonable value or cost of fill but argues that there was no testimony that $1 a cubic yard is a fair estimate of value. Whatever the exact dollar figure be, the proof furnished by appellee's own witness (R. 63) that there are 1,000,000 cubic yards of "clean non-burnable fill" which must be supplied by appellants means that the cost would be *very* substantial. Whether the actual cost be $1,000,000 or half or a quarter of that sum, the requirement that appellants spend the money to supply 1,000,000 cubic yards of fill for an excavation legally made over 30 years, is unreasonable and unconstitutional. The severity, inequity and unconstitutionality of such affirmative requirement of refilling becomes even more apparent, in view of the 1956 judgment

(exhibit 3 of our main brief) which *expressly* held that appellants have the legal rights of "a prior non-conforming use in the conduct of a sand and gravel business which may be carried on on the entire premises" of appellants. Admittedly, 20 acres of appellants' 38 acres are under water. The record contains no evidence of any difference in facts or circumstances surrounding appellants' excavating activities between 1956 (when the judgment was entered, permitting underwater excavation) and 1958 (when Ordinance No. 16 was amended, prohibiting underwater excavation) to justify the requirements of refilling.

The requirement of refilling is so impossible to sustain under appellee's theory of *regulatory* legislation that appellee does not offer any serious argument or justification for the requirement of putting back 1,000,000 cubic yards taken out of the property. Appellee does not dispute the fact that the Ordinance (section 4(j)) makes this requirement. Appellee argues (brief, p. 12) that the judgment does not direct appellants to refill their 20 acres. To the contrary, the judgment does expressly state (R. 14) that the "defendants [appellants] have failed to refill * * * where earth has already been removed" and that this constitutes a "violation of the said Ordinance No. 16" (R. 13).

Since the judgment itself recites (R. 13, 14) that it is a "violation" of the Ordinance not to refill, it is an exercise in casuistry to argue that the requirement of refilling (section 4(j)) is not applicable to appellants because appellee has not yet sought a supplemental court order containing affirmative, mandatory provisions for refilling.* Certain it is that if the judgment below be affirmed, appellee will obtain such order.

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* Section 10 provides criminal sanctions for violations of the Ordinance.

We do not understand appellee's statement (brief, p. 12) that neither the ordinance nor the judgment requires appellants "to refill the entire 20 acre excavation *whether or not* they propose to resume excavating" (emphasis in original). The Ordinance (section 4(j)) provides for refilling "whether or not" appellants "propose to resume excavating". Section 4(j) states unambiguously and unconditionally that "when earth has been removed * * * to the maximum extent allowable under this ordinance * * * such pit shall be *immediately* refilled with clean, non-burnable fill * * *" (emphasis added). The "maximum extent allowable under this ordinance" (section 4(j)) is the "two feet above the maximum ground water level", provided for in section 4(h). Since it is admitted (appellee's brief, p. 3) that appellants' excavation on 20 acres has reached a point where the "average depth" is "25 feet *below* water level", the only possible conclusion is that appellants are required (by section 4(j)) *"immediately"* to refill these 20 acres—without regard to whether appellants "propose to resume excavating" (appellee's brief, p. 12). Furthermore, how can appellants "resume excavating" on these 20 acres under water, in the face of section 4(h) which prohibits all excavating below water level?

POINT II

Ordinance No. 16 is unconstitutional because it is prohibitory of all future excavation activities conducted by appellants over a period of 30 years and because it requires the refilling of an excavation covering 20 acres which, admittedly, was legally created over these 30 years.

Appellee's major legal point is (1) that Ordinance No. 16, as amended in 1958, has a presumption of constitutionality and (2) that that presumption—admittedly (appellee's brief, p. 20) "rebuttable"—has not been overcome. The presumption on which appellee depends is a presumption of regularity or constitutionality of legislation which reasonably *regulates* activities, under the doctrine of police powers. All the cases cited by appellee (pp. 16, 17) in support of the presumption are cases involving *regulation* (see pp. 14-17 *infra*).

Where the alleged regulations become prohibitory and confiscatory then regulation becomes a "taking" prohibited by the due process clause (*Pennsylvania Coal* v. *Mahon*, 260 U. S. 393 and cf. Harlan, *J.* in *U. S.* v. *Central Eureka Mining*, 357 U. S. 155, 182 " • • • regulation which severely diminishes the value of property may constitute a 'taking' " (citing cases, including the *Mahon* case)).

Appellee's contention (brief, p. 23) that Ordinance No. 16 "merely regulates" excavation is factually incorrect. The statement which thereafter follows (brief, p. 23): "Every regulation necessarily prohibits to some degree", overlooks the fact that if it be a true regulation, such regulation also *permits* to some degree. The provisions of sections 4(h) and (j) do *not* permit underwater excavation, to any degree.

In our main brief and again in this reply brief, we have demonstrated (1) that sections 4(h) and (j) of the Ordinance constitute complete prohibition of underwater dredging and excavation, which is the *only* type of excavation engaged in by appellants during their 30 year operation and (2) excavating under water was directly adjudicated in the 1956 litigation to be a "prior non-conforming use" which gave appellants the legal right to "carry on on [their] entire premises". (See Exhibit 3 annexed to our main brief.) No presumption of constitutionality accrues or applies to such confiscatory legislation.* This is recognized by appellee itself which had devoted much of its brief to arguing that sections 4(h) and (j) do *not* prohibit appellants' activities.

If we assume, *arguendo*, that there is a presumption of constitutionality even in the enactment of *prohibitory* legislation, when it is shown that such legislation wipes out vested legal rights of a prior non-conforming use—as we find in this case—then any assumed presumption is overcome; and we reach the same conclusion *viz*: that such legislation constitutes a taking of such vested rights of the prior non-conforming use, and is unconstitutional. *Town of Somers* v. *Camarco*, 308 N. Y. 537 is a direct holding that a non-conforming use of excavating sand and gravel may not be eliminated by town ordinance, without compensation.** This rule of law (considered in our main

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* In the *Reinman, Pierce Oil, Mugler* and other cases cited by appellee (brief, p. 14) which were considered in our main brief (pp. 30-32) prohibition of certain activities were sustained where nuisance was *proved*, not presumed. See *infra*, pp. 24, 25.

** In the September 1961 issue of Western Reserve Law Review (Vol. 12, No. 4), in an article entitled "*Regulation and Removal of Nonconforming Uses*" the author states (p. 695): "The overwhelming majority view in the United States today is that a zoning ordinance which makes no provision for the continuation of a prior non-conforming use is unconstitutional."

brief, pp. 19-24) is actually not disputed by appellee, who argues that the rule is not applicable here because there is no elimination or prohibition of the prior non-conforming use of underwater excavating.

Appellee also argues (brief, pp. 14, 22, 23) that the ordinance prohibiting excavation in the *Camarco* case was labeled a "zoning" ordinance, whereas Ordinance No. 16 is not labeled zoning but is an exercise of "police powers"; from which appellee concludes the "subject ordinance differs" from the ordinance in *Camarco*. We submit that the label of the ordinance which, in both cases, provides for the termination and prohibition of all underwater excavation, is of no significance. The zoning ordinance in the *Camarco* case and the ordinance in issue on this appeal are both bottomed on the doctrine of "police powers".

We previously pointed out that the cases cited by appellee (brief, pp. 16, 17) in support of its argument that there is a presumption of constitutionality of the confiscatory provisions of sections 4(h) and (j) of Ordinance No. 16, are all cases involving true regulation and not prohibition of activities. These cases are therefore not applicable to the issue involved on this appeal. In the first case cited by appellee, *Borden's Farm Products* v. *Baldwin*, 239 U. S. 194, the issue was the regulation and classification of sellers of milk. There was no issue of prohibition in that case.

In *United States* v. *Carolene Products Co.*, 304 U. S. 144, a case involving a statute regulating the sale of milk, the holding was (p. 154): "• • • as the statute is not unconstitutional on its face, the demurrer should have been overruled."

Matter of Wulfsohn v. *Burden*, 241 N. Y. 288 is a zoning case, which appellee cites (p. 16) although appellee argues (brief, pp. 22, 23) that zoning statutes and police power ordinances stem from essentially different sources. In the

Wulfsohn case, the ordinance limited and regulated—not prohibited—the construction of apartment houses.

Appellee also cites (p. 17) *Shepard* v. *Village of Skaneateles*, 300 N. Y. 115, another zoning case, in which Judge Fuld said (p. 118):

> "The zoning regulation • • • may neither deprive an individual owner 'of all beneficial use of his property' *Matter of Eaton* v. *Sweeny*, 257 N. Y. 176, 182-183, nor impose upon him 'a special hardship, unnecessarily and unreasonably' *Dowsey* v. *Village of Kensington*, 257 N. Y. 221, 226."

In *Wiggins* v. *Town of Somers*, 4 N. Y. 2d 215, also cited by appellee (p. 16), there was a limitation or regulation of dumping garbage in the Town of Somers. The plaintiff's business was the collection of garbage and the ordinance, which provided that plaintiff could not collect garbage outside the Town of Somers and bring it into the Town of Somers, was held to be a proper regulation and constitutional. In this case, as in all the other cases cited by appellee, there was no total prohibition such as we find in our case.

Matter of Stubbe v. *Adamson*, 220 N. Y. 459 is another regulation case.

Olsen v. *Nebraska*, 313 U. S. 236 cited by appellee (brief, p. 16) for the proposition that "Questions as to the wisdom, need or appropriateness of the enactment are for the legislative body", is a case upholding legislation which limited and regulated fees of employment agencies to 10%.

Even though appellee admits that the presumption of constitutionality of regulatory legislation is "rebuttable", the fundamental theory of appellee (brief, pp. 16, 17) is that legislation, although prohibiting activities extending over a 30 year period without any proof that such ac-

tivities have become or are evil or noxious, should not be tampered with by the courts. Although appellee stresses and repeats its contention that appellants did not rebut an alleged—but improperly assumed—presumption of constitutionality of confiscatory legislation, appellee gives no indication what the appellants should have done or proved to rebut such alleged presumption. The simple fact that sections 4(h) and (j) make it unlawful and illegal for appellants to excavate under water and require the filling of 20 acres with 1,000,000 cubic yards of fill, is all the proof necessary to overcome any presumption of constitutionality which appellee would apply even to confiscatory legislation.

Appellee also cites (brief, p. 17) *Defiance Milk Products Co.* v. *DuMond*, 309 N. Y. 537 which holds that a presumption of constitutionality of *regulation* of the sale of milk was overcome by the same type of proof involved in our case, to wit: the showing of "an absolute ban" (309 N. Y. at p. 541). The Court in that case stated (p. 541):

> "Appellants argue that plaintiff failed to carry the burden of proof. We do not agree. All plaintiff had to show was that no reasonable basis existed for an absolute ban against evaporated skimmed milk. Since no one has been able to discover any such basis, requisite proof of unconstitutionality was present."

In our case, there is uncontroverted proof (R. 122) that the walls of the excavation are "stable"; there has never "been a cave-in or tearing away of the bank around this pit" (R. 121); there is no proof of any injury to person or property; the entire premises of appellants are completely surrounded by a 6 foot wire fence topped by three strands of barbed wire maintained in good condition (R. 82); there is no proof of a single trespasser in all the years of appellants' operations. We shall consider this lack of any showing of danger or nuisance later in this

brief (Point III); we summarize the testimony at this time to demonstrate how it falls within the *Defiance Milk Products* case, cited by appellee.

Finally we consider *New York Trap Rock Corp.* v. *Clarkstown*, 1 A. D. 2d 890 aff'd 3 N. Y. 2d 844, another zoning case cited by appellee (p. 17), in which we find the following statement (1 A. D. 2d at p. 891).

> "* * * at the time the ordinance was adopted, respondent had no vested right to quarry on parcel 17. It had neither made a substantial investment with a view toward quarrying on said parcel nor made any substantial use of said parcel for such purposes."

The court in the *New York Trap Rock* case cited *Town of Somers* v. *Camarco*, 308 N. Y. 537 and *People* v. *Miller*, 304 N. Y. 105. How different is our case where the investment has been very substantial, where the operations have been continuously carried on for more than 30 years and where we have an express adjudication (Exhibit 3 attached to main brief) that appellants "have made such a substantial investment in improvements in the business to warrant the continuance of [their] non-conforming use. See *People* v. *Miller*, 304 N. Y. 105; *Town of Somers* v. *Camarco*, 308 N. Y. 537".

Appellee also discusses (brief, pp. 18-24) a number of cases, most of which were decided by trial courts, involving ordinances *regulating* sand pits. In the very case (*Town of Huntington* v. *Broad Hollow Estates*, N. Y. L. J. Sept. 17, 1957, p. 12) from which appellee quotes (brief, pp. 18, 19), it is made clear that the court did not pass upon any ordinance or facts comparable to the facts or ordinance (sections 4(h) and 4(j)) involved on this appeal. The court in the *Broad Hollow* case said:

> "Without *regulation*, many sand and gravel pits would become a menace to the public * * *"

We find no fault with the foregoing statement or the holdings in the cases cited by appellee (pp. 18-24) *viz*: that *regulation* of excavating (e.g. fencing, width of berm, degree of slope) is necessary, proper and constitutional. However, these cases do not stand for either of the following propositions argued by appellee:

(1) "This is not a novel situation. Sand pit ordinances in material and substantial part, identical or similar to the one at bar have frequently been before the courts" (appellee's brief p. 18) and

(2) "It is clear that pits like the subject one constitute the kind of dangerous use that may be eliminated" (appellee's brief p. 24).

None of the cases cited by appellee (pp. 18-24) involved either (a) an absolute prohibition of all underwater dredging or (b) the requirement that excavation, legally made, be refilled at a mountainous cost; and none of the cases uphold the principle (brief p. 24) that "pits like the subject one * * * may be eliminated"—without payment to the property owner.

Appellee probably quotes from the opinion in the *Broad Hollow* case (p. 18) because of its *dictum* that "lives of young children have been lost in these *unguarded* sand pits" (emphasis added). Not only is this *dictum*, and not only is there no proof in our case that lives of children—or adults—have been lost on appellants' property, but the *dictum* in the *Broad Hollow* case concerning loss of lives in "*unguarded* sand pits" is certainly not pertinent or applicable to our excavation which is *not* "unguarded", but which is completely surrounded by 7000 feet of 6 foot wire mesh fence, constructed in conformity with the regulatory provisions of Ordinance No. 16.

In addition to sections 4(h) and (j) of the Ordinance which prohibit all underwater excavating and require the refilling of the 20 acres of appellants' property where the water is located, there are other provisions of the Ordinance which go beyond the power of the Town to make reasonable regulations in the excavating industry. Specifically we refer to section 4(c) of Ordinance No. 16, as amended in 1958 (R. 6), which requires that the 6 foot chain link fence which appellants constructed in 1949 (R. 82) be "set on a concrete curb not less than 18 inches in depth". This requirement of an 18 inch concrete base under appellants' fence, extending 7,000 lineal feet, would obviously require that this entire 7,000 feet of fence, which was constructed in accordance with the Ordinance in 1949 (R. 138) before curbing was required, be up-rooted, that the concrete base be put in, and that the fence be placed on top of the concrete. Conceding the fact that reasonable regulations are to be given a presumption of constitutionality, the evidence in this case shows that this regulation is not reasonable. The Town's own employee testified that "practically a whole new fence was constructed around the property" by appellants in 1949 (R. 138), that he inspected this construction (R. 138) and that there was no requirement for a concrete curb at that time (R. 140, 141). There was testimony that the fence has been continuously inspected (R. 84, 123, 126) and the appellee was unable to show any holes in the 7,000 feet of fence. (The most appellee was able to show were two small depressions underneath the fence (R. 63) which the trial court gratuitously—without the support of any testimony—suggested were "evidently dug by children" (R. 179).) The County engineer, testifying for appellee, testified that his department has not installed concrete curbs under the fences maintained by the County which were erected prior to the 18 inch concrete curb requirement, which was enacted in the 1958 amendments to Ordinance No. 16 (R. 135, 136). The

requirements of ripping up the entire fence (7,000 feet) and installing a new concrete base, is oppressive and unwarranted by any evidence in the record. The dissenting opinion of Judge Van Voorhis (R. 205) considers this onerous and oppressive requirement of the concrete curb and concludes:

> "No object in the installation of this concrete curbing has been shown except that it would put defendants [appellants] to the expense of removing the fence, laying the concrete and constructing a new fence. This, [fol. 266a] along with the prohibition of excavation below water level or more than 10 feet below the highway level, and the extension from 10 to 20 feet of the permitted distance between the excavation and the property line and the retrospective requirement of refilling all that had been excavated since 1927, shows that the purpose was expropriation rather than regulation."

POINT III

The contention of appellee that the total prohibition of excavation is constitutional as a proper exercise of police powers is erroneous because there is no proof to support the contention of danger or nuisance. Appellee's resort to "judicial notice" of different fact situations in other excavations is not a substitute for facts or evidence of nuisance or evil in our case, which the Town failed to provide.

As we have seen (Points I and II, *supra*) the main contention of appellee, to avoid the unconstitutionality of Ordinance No. 16, is that the Ordinance does not provide for prohibition, but only regulation of excavation. The majority opinion of the Court of Appeals (R. 200) adopted this contention.

Appellee also argues that even if the Ordinance does provide for prohibition of excavation, the Ordinance is valid as an exercise of the Town's police powers. We noted (our main brief pp. 21, 22) that in *Town of Somers* v. *Camarco*, 308 N. Y. 537, the Court held that a prohibition of the business of excavation, where it constitutes a nonconforming use, is unconstitutional. By way of *dictum* the Court in that case said (p. 541) that if there were proof of "the creation or maintenance of a nuisance on the premises of the defendants" then the situation might be different. There is no proof in our case that there was any "creation or maintenance of a nuisance" in appellants' operations extending over 30 years. At no time did the appellee-Town so contend, although it is obvious from the history of the litigation between the parties that the appellee-Town has been trying for years to eliminate appellants' operations—without paying therefor.

In the 1956 litigation (main brief, exhibits 2 and 3) the Town could have, but did not litigate the question of danger or nuisance in appellants' excavating operations. On this trial, the Town did not show one single instance of trespass, or injury to person or property, or any potential danger, harm or injury to person or property. The testimony with respect to the fencing around the entire property, stability of slopes, no cave-ins or potential cave-ins, was uncontradicted. In sum, there is no proof whatsoever that appellants' operations are dangerous or potentially dangerous or constitute a nuisance.

We noted in our main brief the statement in the dissenting opinion (R. 204) (in which three judges joined) that on the argument in the Court of Appeals, appellee admitted that it "does not contend that this condition [i.e. appellants' excavation] amounts to a nuisance". In its brief (pp. 12, 13) appellee states that "it made no such concession". Appellee's argument (p. 13) that appellants did not "mention" this concession in its "reply argument in the Court of Appeals" is meaningless because there was, in fact, no "reply argument" and, in any event, there was no occasion to comment on a concession made by appellee in open court.

In addition to appellee's admission (R. 204) that appellants' operations do not constitute a nuisance, there are no facts in this record which would support any contention of nuisance. Appellee appears to recognize that this is so because it includes in its brief (p. 6) a story of an alleged drowning, on the excuse that appellants stated in their prior briefs that the record does not show any "loss of life or property on appellants' premises". Actually, appellants' statement is correct; the record does *not* contain any proof of "loss of life or property on appellants' premises". And actually appellants do not know whether even the one drowning discussed by appellee took place. It is not in the

record in this case and appellants have no personal knowledge thereof. Accordingly, we do not know how this Court would be able to take "judicial notice" of a "fact" about which there is, at least, a factual question. Furthermore, as appellee admits (brief, p. 7), the one alleged drowning is "inconsequential" and would not be sufficient to sustain the validity of Ordinance No. 16.

Secondly, with respect to alleged drownings in "pits like the subject one" (appellee, brief p. 6) such statement of counsel constitutes no proof and no substitute for proof of nuisance or danger in our case because the record does not contain any such facts and we don't know (and it certainly is not a subject matter of judicial knowledge) (a) whether there were drownings, (b) the circumstances of such alleged drownings, and (c) whether "other pits" were, in fact, "like" the excavation in our case. As a matter of fact, the *dictum* of the *Broad Hollow* case, quoted in appellee's brief (p. 18), *re* "loss of lives in pits," expressly speaks of "*unguarded* sand pits"—which are *not* "like" ours. In any event, what may have happened "in other pits", under circumstances not revealed in our record on appeal, is of no pertinency to the issue of danger or nuisance in appellants' operations.

Although appellee expressly states that it does not contend that the excavating business "is evil *per se*" (brief, p. 11), nevertheless throughout its entire brief it tries to paint a picture of awe, danger, or evil in describing the man-made lake as a "sprawling 20 acre crater" (brief pp. 1, 2). And appellee gratuitously suggests that Ordinance No. 16 "was inspired by the commonly known appalling statistics of children's drownings in such pits" (brief p. 2), although there is not a single instance in our record of any drownings in this pit or any other pit like ours. Appellee also presents a new suggestion, not raised

in the courts below, that the Ordinance was "intended to protect against possible pollution of the local water supply" (brief p. 2), although there is no evidence in the record on any issue of pollution of any water supply.*

Not only does appellee try to make up for its lack of proof of nuisance by discussing alleged "other pits" (which are *not* subject to judicial notice) but it seemingly takes the position that the burden of proof of showing such nuisance was on the appellants. In taking this position, appellee mistakenly relies on the presumption of constitutionality of regulatory legislation. That rule would not put the burden on appellants of proving that their activities constituted a nuisance in order to sustain the constitutionality of the Ordinance. Certainly appellants do not have to prove that there is no nuisance. Actually, the fact that there were no injuries to person or property, no trespassers, no potential danger to person or property, the complete fencing of appellants' property—all this demonstrates: no nuisance.

After appellants demonstrated the unconstitutionality of the Ordinance because it prohibits all future excavation and requires refilling of the excavation—thereby eliminating appellants' adjudicated rights of their non-conforming use—then if the Town wanted to sustain the legislation on the theory of nuisance, the Town would have to prove such

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* As we pointed out in our main brief (p. 35) and appellee does not deny in its brief: appellee's representatives discussed with appellants the possibility of condemning appellants' property for use in appellee's plans of drainage. Paying for appellants' property *via* condemnation would be the "constitutional way" (*Pennsylvania Coal* v. *Mahon*, 260 U. S. at p. 416) of acquiring appellants' property for the public purpose of drainage or protection against "possible pollution" (appellee's brief, p. 2). Taking appellants' property, without payment, is not the "constitutional way".

nuisance, as suggested in *Town of Somers* v. *Camarco*, 308 N. Y. at p. 541.

After stating its main contention that the Ordinance "is not an absolute prohibition but merely a regulatory enactment" (appellee's brief, p. 14), appellee makes its second contention that even if Ordinance No. 16 does constitute a prohibition of future excavation, the Ordinance would "nonetheless be constitutional because of the seriousness of the evil against which it is directed". However, appellee did not prove any "seriousness of the [alleged] evil". In support of its contention, appellee cites: *Reinman* v. *City of Little Rock*, 237 U. S. 171; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498; *Mugler* v. *Kansas*, 123 U. S. 623; *Powell* v. *Pennsylvania*, 127 U. S. 678; and *U. S.* v. *Central Eureka Mining Co.*, 357 U. S. 155.

The foregoing cases, which we considered in our main brief (pp. 30-32), do not support a holding of constitutionality of the confiscatory provisions of Ordinance No. 16 because in each of those cases, the evil or nuisance involved in the conduct of the business which was prohibited (a stable, storage of oil, making of distilled liquors, the production of oleomargarine) was *factually* proven—in most cases, in the pleadings themselves.* (See our main brief, pp. 30, 31.)

In the *Reinman* case, the stables were, on the pleadings, admitted to be "productive of disease". In the *Pierce Oil*

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* In the recent dissertation on "*Regulation* and *Removal* of Nonconforming Uses" (12 Western Reserve Law Review at p. 699) the author states: "It is clear that an activity cannot simply be declared by ordinance to be a nuisance and its removal thereby compelled" (citing cases). See also 11 Baylor Law Review 306, 310, 311: ". . . a municipal corporation cannot, under its police power to abate nuisances, suppress in toto or in part any legitimate business, trade, or profession which is not a nuisance *in fact*." (Emphasis added.)

case the pleadings admitted that the storage of gasoline, in the circumstances in that case, was dangerous.

In the *Mugler* case, this Court noted that "a public nuisance" was involved (123 U. S. at p. 662). The appellee in our case does not contend that the record* proves that appellants' operations constitute a "public nuisance". Although appellee now disputes the concession it made on the argument in the Court of Appeals that appellants' operations do *not* constitute a nuisance, the fact remains that there are no facts in our case which would support any finding of nuisance to justify the total elimination of excavating underwater and the requirement of filling 20 acres, after 30 years of admittedly legal operations.

Accordingly, the foregoing cases, involving nuisance, where total prohibition has been permitted (cases described by Mr. Justice Douglas in the *Saxl* case, 328 U. S. 80, 83 as "extreme cases") are inapplicable in the case on appeal where, to the contrary, appellants' operations are not shown to be dangerous or to constitute a nuisance. In the article in 12 Western Reserve Law Review, *op. cit. supra*, at p. 699, it is stated:

> "* * * a municipality cannot completely prohibit a legal business merely by calling it a nuisance. See Simon v. City of Cleveland Heights, 46 Ohio App. 234, 188 N. E. 308 (1933); Wolarz v. Village of Cuyahoga Heights, 53 Ohio App. 161, 4 N. E. 2d 400 (1936). *A fortiori*, a legal, existing nonconforming use could not be terminated merely by classifying it as a nuisance."

In *Wolarz* v. *Village of Cuyahoga Heights*, 53 Ohio App. 161, the ordinance was, as in our case, enacted under "police

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* Appellee relies on "judicial knowledge" which we discussed, *supra*. See also Point I of brief of *Amicus Curiae* in this case on appeal.

powers" as an "emergency amendment to existing ordinances" and prohibited the maintenance of coal yards within a few hundred feet of food factories. As we have seen, the appellee in our case tries to make much of the fact (appellee brief, pp. 14, 22, 23) that Ordinance No. 16 is not a zoning ordinance but is a "police power" ordinance and thereby appellee seeks to distinguish the holding in *Town of Somers* v. *Camarco*, 308 N. Y. 537. In the *Wolarz* case, where the ordinance was labelled a "police power" regulation of a business located properly in a zoned area, the Court of Appeals of Ohio held the ordinance unconstitutional, as a deprivation of property without due process. The ordinance itself stated that it was enacted as "an emergency measure by reason of the subject matter [in] the immediate preservation of the public health and safety • • •". This declaration of the purpose of the ordinance was held insufficient to sustain the ordinance, which prohibited the carrying on of the coal business, the Court stating (53 Ohio App. at p. 164):

> "There is no doubt that the council of those municipalities may impose reasonable regulations as to the manner in which coal yards shall be operated and conducted so as to prevent the coal yards from becoming a nuisance in point of fact. But the council • • • has no power to prohibit the operation of coal yards on the theory that the same constitutes a nuisance per se."

The Court quoted from *First Avenue Coal* v. *Johnson*, 171 Ala. 470:

> "The constitutional right of the citizen cannot be abridged or destroyed under the guise of police regulations. The legislature therefore, cannot, by its mere *ipse dixit*, make that a nuisance which is not in fact or truth a nuisance, or akin thereto."

Furthermore, with respect to the "extreme cases" (where prohibition of activities is upheld, where nuisance is *proved* cf. *Reinman, Pierce, Mugler*) we again point out that the prohibition of extraction of minerals from the earth (section 4(h) of Ordinance No. 16) is a prohibition of the use of one's own land, as contrasted with the prohibition of a business located on the land, which can be moved elsewhere. This distinction was recognized by this Court in *Hadacheck* v. *Los Angeles*, 239 U. S. 394, 410-412 which we considered in our main brief (pp. 23, 24). In the situation where a noxious business is prohibited (e.g. the stables in *Reinman*) only a limitation results in the use of the real property which may be thereafter used for other purposes than the proscribed business or activities. However, when, as in our case, the very use of the real property *qua* real property is prohibited, i.e., where there is a prohibition of removal of the mineral content of the land itself, then there is indeed a total elimination of all uses of the real property itself. We ask this Court to consider also the brief of *Amicus Curiae* (pp. 22-26) which discusses this aspect of the appeal at greater length.

Finally, with respect to such cases as *Reinman* and *Pierce Oil* and *Mugler*, we note that all of these cases were considered and cited in the dissenting opinion (one judge) in *Pennsylvania Coal* v. *Mahon*, 260 U. S. 393. However, the majority opinion in that case found the Pennsylvania statute, prohibiting mining under houses and buildings, to be unconstitutional as a "taking", this Court pointing out that it might very well be that mining under the houses would be dangerous (as *expressly* stated by the Pennsylvania legislature) but that the "constitutional way" of eliminating the legal rights of such excavation was by "the exercise of eminent domain" (260 U. S. at 413). We have examined all subsequent reported cases citing *Pennsylvania Coal* v. *Mahon*, and we do not find that the principle stated there-

in has been altered or watered down whatsoever. It is noteworthy that the 30 page brief of appellee cites the *Mahon* most casually (pp. 16, 20), contains no analysis of that case and no answer to the detailed analysis of that case found in our main brief (pp. 10, 13, 16, 20, 33, 34).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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